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Supreme Court, U.S.
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No. 96-_____

In the
Supreme Court of the United States
October Term, 1995

Mable Shangreau,

Petitioner,

vs.

Bruce Babbit, Secretary of the United States Department of Interior,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1986 Congress enacted the White Earth Reservation Land Settlement Act, which quieted title to allotments of White Earth Reservation land illegally sold or transferred out of trust decades earlier and set up a procedure for determining the compensation due the original allottees or their descendants. To determine who was an heir able to a claim interest in compensation for an allotment, Congress chose to define heir in § 3(l) of the Act by borrowing from Minnesota law in effect on March 26, 1986. Minnesota law then in effect and applicable here did not allow illegitimate children, even when paternity was established, to inherit by right of representation in cases of intestate succession for decedents dying on or before December 31, 1986. The questions presented are:

(1) Whether the equal protection provisions of the Due Process Clause of the Fifth Amendment prohibit Congress from enacting a statute that prohibits an illegitimate child, irrespective of adequate proof of paternity, from inheriting by right of representation through his father.

(2) Whether governmental interests in quieting title to land, preventing fraudulent or stale claims, or in administrative or finality, justify a statute that prevents an illegitimate child from establishing paternity at an heirship proceeding.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

I. THE WHITE EARTH RESERVATION LAND SETTLEMENT ACT 4

II. PETITIONER SOUGHT TO ESTABLISH HER RIGHT TO A SHARE OF AN ALLOTMENT THROUGH HER LATE SON 10

REASONS FOR GRANTING THE WRIT 13

ARGUMENT 15

I. THE COURT SHOULD GRANT THE WRIT AND SUMMARILY REVERSE THE JUDGMENT BELOW, AS A TOTAL BAR CANNOT PROPERLY BE IMPOSED ON AN ILLEGITIMATE CHILD'S INHERITING THROUGH HIS FATHER 15

II. THE JUSTIFICATIONS SET FORTH BY THE COURT BELOW INDICATE THAT THIS COURT SHOULD ADDRESS THE CONFLICT IN THE LOWER COURTS REGARDING WHAT DISTINCTIONS CAN PROPERLY BE DRAWN BETWEEN THE INHERITANCE RIGHTS OF ILLEGITIMATE AND LEGITIMATE CHILDREN. 20

III. THE ISSUE RAISED BY THIS CASE IS A RECURRING ONE 23

CONCLUSION 24

TABLE OF AUTHORITIES

FEDERAL CASES

Clark v. Jeter, 486 U.S. 456 (1988) 14, 18, 21, 22

Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982) 22, 23

Daniels ex rel. Daniels v. Sullivan,
979 F.2d 1516 (11th Cir. 1992) 21, 22, 23

Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975) 12, 13, 17

Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981) 19

Gomez v. Perez, 409 U.S. 535 (1973) 16

Haas v. Chater, ___ F.3d ___, 1996 WL 97454,
(7th Cir. Mar. 6, 1996) 21, 22, 23

Handley ex rel. Herron v. Schweiker,
687 F.2d 999 (11th Cir. 1983) 22

Labine v. Vincent, 401 U.S. 532 (1971) 18, 19

Lalli v. Lalli, 439 U.S. 259 (1978) 12, 14, 18,
21, 22, 23

Lawrence ex rel. Lawrence v. Chater, ____ U.S. ___,
116 S. Ct. 604 (1996) 20

Levy v. Louisiana, 391 U.S. 68 (1968) 16, 19

Little v. Streater, 452 U.S. 1 (1981) 18

Littlewolf v. Lujan, 278 U.S. App. D.C. 270,
877 F.2d 1058 (D.C. Cir. 1989), *cert. denied*,
493 U.S. 1043 (1990) 5, 6, 7

Manypenny v. United States, 948 F.2d 1057
(8th Cir. 1991) 17

Mathews v. Lucas, 427 U.S. 495 (1976) 3, 21

Mills v. Habluetzel, 456 U.S. 91 (1982) 21

Morrow v. United States, 243 F. 854 (8th Cir. 1917) 6

Pickett v. Brown, 462 U.S. 1 (1983) 21

Reed v. Campbell, 476 U.S. 852 (1986) 19

Trimble v. Gordon, 430 U.S. 762 (1977) 14, 15, 16,
18, 19, 20,
21, 22, 23

Veeney ex rel. Strother v. Sullivan,
973 F.2d 326 (4th Cir. 1992) 22, 23

Williams v. Lambert, 902 F. Supp. 460
(S.D.N.Y. 1995) 19, 23

STATE CASES

Allen v. Harvey, 568 S.W.2d 829 (Tenn. 1978) 19

Lucas v. Handcock, 266 Ark. 142, 583 S.W.2d 491
(1978) 19

State v. Zay Zah, 259 N.W.2d 580 (Minn. 1977), cert. denied, 436 U.S. 917 (1978) 6, 7

CONSTITUTIONAL PROVISION

U.S. Const., amend. V 3, 13

STATUTES

28 U.S.C. § 1254 (1) 2

28 U.S.C. § 1331 (1994) 2, 12

Indian Law Technical Amendments Act of 1987, § 6(a), Pub. L. No. 100-153, 101 Stat. 886 8

Minn. Stat. § 524.2-106(1) 10

Minn. Stat. § 524.2-109(2) 9

Minn. Stat. § 525.172 (1984) 3, 8

White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, 25 U.S.C. § 331 note 2, 3,4, 7, 8, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 23, 24

OTHER AUTHORITIES

VA, William F. Fratcher, Scott on Trusts § 574
(4th ed. 1989 and Supp. 1995) 19

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mable Shangreau respectfully prays that the Court issue a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit filed in this proceeding on October 4, 1995. That court denied a petition for rehearing on January 4, 1996.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 68 F.3d 208 (8th Cir. 1995) and is reprinted in the Appendix at A-1, *infra.*

The opinion of the district court is unreported and reprinted in the Appendix at A-14, *infra.*

The opinion of the Interior Board of Indian Appeals is reported at 25 IBIA 133 (1994) and is reprinted in the Appendix at A-30, *infra.*

The opinions of the administrative law judge are unreported and are reprinted in the Appendix at A-36 and A-43, *infra.*

JURISDICTION

This case involves the effort of Mable Shangreau to inherit from her late son. She brought her action under the White Earth Reservation Land Settlement Act of 1985 ("WELSA" or the "Act"), Pub. L. No. 99-264, 25 U.S.C. § 331 note, and 28 U.S.C. § 1331 (1994). As Ms. Shangreau raised a constitutional challenge to the Act, this case also arises under the equal protection provision of the Due Process Clause of the Fifth Amendment of the United States Constitution. The Eighth Circuit issued its decision on October 4, 1995, and denied the petition for rehearing of Ms. Shangreau on January 4, 1996. This Court has jurisdiction to consider this petition under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The primary statutes involved are:

The equal protection of the laws inherent in the Due Process Clause of the Fifth Amendment of the United States Constitution:[1]

***

> No person shall be deprived of life, liberty, or property without due process of law;

Section 3(l) of WELSA, 25 U.S.C. §331 note (1994), which reads as follows:

> (l) 'Heir' means a person who received or was entitled to receive an allotment or interest as a result of testate or intestate succession under applicable Federal or Minnesota law, or one who is determined under section 9, by the application of the inheritance laws of Minnesota in effect on March 26, 1986 (not including laws relating to spousal allowance and maintenance payments), to be entitled to receive compensation payable under section 8.

The full text of the Act is found in the Appendix at A-55.

Minn. Stat. § 525.172 (1984), which read as follows:

---

[1] See *Mathews v. Lucas*, 427 U.S. 495, 502 (1976) (referring to such gloss on the Due Process Clause)

> A child born to a mother who was not married to the child's father when the child was conceived nor when the child was born shall inherit from his mother the same as if the child was conceived or born to her while she was married, and also from the person who in writing and before a competent witness shall have declared himself to be his father, provided such writing or an authenticated copy thereof shall be produced in the proceeding in which it is asserted or from the person who has been determined to be the father of such child in a paternity proceeding before a court of competent jurisdiction; but such child shall not inherit from the kindred of the father by right of representation.

This provision was in effect in Minnesota on March 26, 1986. .

STATEMENT OF THE CASE

I. THE WHITE EARTH RESERVATION LAND SETTLEMENT ACT

Congress passed WELSA in 1986 ("WELSA" or the "Act"). Pub. L. 99-264, 100 Stat. 61, *codified at* 25 U.S.C. § 331 *note*. The Act was designed to quiet title to land sold illegally out of trust decades earlier and to compensate persons who had a claim to such land:

> The Act extinguishes the Indians' claims to land illegally transferred earlier in this century, in return for payment of

> compensation based on the fair market value at the time of transfer plus five percent interest. The Act gives claimants the option of filing an action for judicially determined compensation within six months of the issuance of notice of the payment due them, in which case they forgo their statutory compensation.

Littlewolf v. Lujan, 278 U.S. App. D.C. 270, 877 F.2d 1058, 1059 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990).

The impetus for congressional action arose out of shifting federal policies and judicial and administrative decisions regarding reservation land that left unclear whether present day holders of title had valid title to land once within the White Earth Reservation, located in northern Minnesota. The White Earth Reservation, originally comprising 825,000 acres, was established through a series of treaties in the last century for the use and benefit of several bands of Chippewa (Ojibway) Indians. In 1889 Congress enacted the Nelson Act, which resulted in the reservation being divided up and parceled out to individual tribal members. Under the General Allotment Act of 1887, the federal government issued trust patents to individual Indians that provided that the United States would hold title temporarily in trust. While the term of the trust was first limited to 25 years, by executive orders the president extended the trust term, and with the passage of the 1934 Indian Reorganization Act, Congress made the trust indefinite in duration. S. Rep. No. 192, 99th Cong., 1st Sess. (1985) at 9.

In the period between General Allotment Act of 1887 and the 1934 Indian Reorganization Act, Congress also passed the Clapp Amendment. *Id.* This 1906 law "purported to provide that adult mixed blood White Earth Chippewa took their allotments in fee simple rather than subject to any trust." *Id.*

As a consequence, the Clapp Amendment permitted a transfer of most reservation land from Indians who had received fee simple title. *Littlewolf*, 877 F.2d at 1060. Within three years 80 percent of reservation land had gone into private hands and 90 percent of lands allotted in trust to full-blood Indians had been sold or mortgaged. S. Rep. No. 192, at 6.

While courts set aside some sales because the United States held title in trust at least for full-blooded Indians, the Department of Interior stopped probating estates of mixed-blood allottees, leaving Minnesota courts to probate such estates. *Littlewolf*, 877 F.2d at 1060-61. The problem with title to the allotted trust lands then arose:

> In *Morrow v. United States*, 243 F. 854 (8th Cir. 1917), however, the Eighth Circuit held that trust patents vested in mixed blood allottees an unalterable property right to tax immunity for twenty-five years and suggested that the Clapp Amendment could not unilaterally terminate the trust relationship. Thus, *Morrow* voided tax forfeitures of trust properties and cast doubt upon the validity of many land transfers made from 1906 to 1917. Nonetheless, the Department of Justice, as counsel for the government, made only sporadic efforts to bring suit on behalf of Indians whose land had been illegally conveyed. This lack of enforcement action continued despite successive extensions of the trust period.

Littlewolf, 877 F.2d at 1061.

In 1977, the Minnesota Supreme Court decided *State v. Zay Zah*, 259 N.W.2d 580 (Minn. 1977), *cert. denied*, 436

U.S. 917 (1978). In *Zay Zah*, the court held that the Clapp Amendment could not unilaterally abrogate the trust status. Consequently, the trust allotment in that case retained tax immunity and was not forfeitable. More significantly, the court found that equitable title remained in the heirs of the original allottee. *Id.* at 586-89.

In response to the *Zay Zah* decision, the Department of Interior reversed its earlier position and stated its intent to reprobate all Indian estates and determine current heirs to White Earth Reservation allotments. The Department sent letters to existing holders of former reservation property informing of potential adverse claims to their titles. Unsurprisingly, the *Zay Zah* decision and the reversal of federal policy led to substantial chaos for owners of land within the confines of the former reservation. *See Littlewolf*, 877 F.2d at 1061.[2]

To avoid "interminable litigation" Congress enacted WELSA. Id. There are three features of the Act relevant here. First, once certain preconditions were met, Congress specifically validated transfers out of trust, quieted title as of the date of transfer out of trust and extinguished all claims of any Indian claimant to previously transferred land. WELSA § 6(a) and (b). Second, Congress also directed the Department of Interior to determine who had existing rights to allotments sold out of trust and the amount of compensation due any claimant. Finally, as part of that determination, Congress defined the term "heir" to mean one who was entitled "to receive an allotment or interest as a result of testate or intestate succession under applicable Federal or Minnesota law, or one who is determined under Section 9, by application of the inheritance laws of Minnesota in effect on March 26,

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[2] This chaos is vividly described in *Red Earth, White Earth*, by Will Weaver and published by Simon & Schuster in 1986.

1986 . . . to be entitled to receive compensation payable under Section 8." WELSA § 3(l).

At the request of the Bureau of Indian Affairs, Congress added § 3(l) after WELSA was originally adopted. See Indian Law Technical Amendments Act of 1987, § 6(a), Pub. L. No. 100-153, 101 Stat. 886. The obvious purpose of § 3(l) was to employ one set of rules to determine who could inherit an interest in an allotment, rather than forcing the agency to look potentially to the laws of fifty states.

Section 3(l) of WELSA defined "heir" by the phrase, "one who is determined under section 9, by the application of the inheritance laws of Minnesota in effect on March 26, 1986 . . . to be entitled to receive compensation." The Minnesota inheritance law in effect on that date provided as follows:

> A child born to a mother who was not married to the child's father when the child was conceived nor when the child was born shall inherit from his mother the same as if the child was conceived or born to her while she was married, and also from the person who in writing and before a competent witness shall have declared himself to be his father, provided such writing or an authenticated copy thereof shall be produced in the proceeding in which it is asserted or from the person who has been determined to be the father of such child in a paternity proceeding before a court of competent jurisdiction; but such child shall not inherit from the kindred of the father by right of representation.

Minn. Stat. § 525.172 (1984).

Pursuant to Minnesota Laws 1985, c. 250, § 9, on May 29, 1985, for estates of persons dying *after* December 31, 1986, the Minnesota Legislature adopted a new statute that removed marital status from the determination of parentage and eliminated the concept of illegitimacy as a factor in inheritance.

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:
>
> (1) * * *.
>
> (2) In cases not covered by clause (1), a person is the child of the person's parents regardless of the marital status of the parents and the parent and child relationship may be established under the parentage act, sections 257.51 to 257.74.

Minn. Stat. § 524.2-109(2). Under this new law inheritance was based on establishment of the parent and child relationship under § 524.2-109(2), and intestate succession occurred by right of representation without regard to the marital status of the child's parents:

> If representation is called for by sections 524.2-102 to 524.2-114;
>
> (1) In the case of issue of the decedent, the estate is divided into as many shares as there are surviving children of the decedent and deceased children who left issue who survive the decedent, each surviving child

> receiving one share and the share of each deceased child being divided among its issue in the same manner.

Minn. Stat. § 524.2-106(1).

II. PETITIONER SOUGHT TO ESTABLISH HER RIGHT TO A SHARE OF AN ALLOTMENT THROUGH HER LATE SON

Petitioner Mable Shangreau was the mother of Richard Charles Beaupre, who died intestate, unmarried and without issue, on March 1, 1992. Richard Charles Beaupre was the great-grandson of Lizzie Pemberton Beaupre Blair, a/k/a Mo kah ah mo quaince, whose allotment had improperly been sold or mortgaged out of trust. Lizzie Blair had a son, Richard C. Beaupre, who had a son, Charles Ray, who predeceased him. Charles Ray was the father of Richard Charles Beaupre.

Richard C. Beaupre died in August 1986 and, thus, intestate succession to his estate was governed by Minn. Stat. § 525.172, not the provisions of the Uniform Probate Code Minnesota had adopted to take effect after 1986. But for the proceedings below, Richard Charles Beaupre would have inherited from his grandfather Richard C. Beaupre. Petitioner Shangreau would then inherit the rights of her son in the claim to compensation of Lizzie Blair.

Petitioner Shangreau, an enrolled member of the Pine Ridge Tribe of Ogallala Sioux Indians, entered this case by filing a timely objection to a preliminary determination of the heirs of Richard C. Beaupre. App. at A-43. In the administrative proceedings to determine Richard C. Beaupre's heirs, Judge Massetto found that Lizzie Blair "was preceded in death by a fourth child, Charles Roy Beaupre, who was born August 12, 1943 and died March 12, 1976." App. at A-40. Judge Massetto further found that Lizzie Blair's son "Charles

Roy Beaupre had a son, Richard Charles Beaupre who was born on October 22, 1973, to Mable Shangreau," app. at A-40, but that Charles Roy Beaupre and appellant Shangreau were not married at the time of the child's conception or birth. App. at A-40. In her order, Judge Massetto concluded that appellant Shangreau had produced an "authenticated and uncontroverted `Affidavit of Paternity'", app. at A-41, and that therefore "this tribunal finds that Charles Roy Beaupre was the father of Richard Charles Beaupre." App. at A-41.

Despite proof of paternity, however, Judge Massetto determined that under the Minnesota inheritance laws incorporated by reference into WELSA, Ms. Shangreau's son could not be an heir of his grandfather, Richard C. Beaupre.

> Consequently, even if Charles Roy Beaupre was the father of Richard Charles Beaupre, at best Richard Charles Beaupre's relationship to Charles Roy Beaupre would be that of illegitimate child. Since Charles Roy Beaupre predeceased his father, Richard C. Beaupre, Charles Roy Beaupre's share of WELSA compensation, if any, would go only to his children under the legal principle of right of representation. Inasmuch as Minn. Stat. Sec. 525.172 does not permit a child who was not conceived nor born during marriage to inherit from the kindred of the father by right of representation, Richard Charles Beaupre cannot be an heir of Richard C. Beaupre.

App. at A-41. Further, the administrative law judge Massetto also declined to rule on Petitioner Shangreau's claims that use of Minn. Stat. § 525.172 in WELSA heirship determinations was an unconstitutional denial of equal protection or to

consider how Minnesota courts would have construed that provision under the Federal Constitution. App. at A-47–49.

Ms. Shangreau appealed to the Department of Interior Board of Indian Appeals from orders disallowing her objections and making a final determination of the heirs of Richard C. Beaupre. Ms. Shangreau's constitutional claims were also rejected by the Interior Board of Indian Appeals. Relying on *Estate of Florence Blue Sky Vessel*, 1 IBIA 312, 79 I.D. 615 (1972),[3] the Board held that administrative agencies lacked authority to declare statutes unconstitutional, citing *Johnson v. Robison*, 415 U.S. 361, 368 (1974). App. at A-31.

Petitioner Mable Shangreau filed suit against the Secretary of the Department of the Interior, seeking judicial review of the final order issued by the Interior Board of Indian Appeals. Jurisdiction was invoked under WELSA and 28 U.S.C. § 1331. The district court granted summary judgment to the government in a memorandum opinion and order filed on October 25, 1994, finding that "the statutory provision being challenged does not violate the equal protection guarantees of the Constitution." App. at A-28.

The Court of Appeals for the Eighth Circuit affirmed the decision of the district court. Citing to *Lalli v. Lalli*, 439 U.S. 259 (1978), the court below concluded that the government had an interest in the "the definitive and fair determination of heirship disputes so that it can distribute the compensation funds and thereby extinguish any potential claims that the heirs of a White Earth allottee might have and thus clear title for

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[3] The citation to the *Vessel* case is interesting. In that case, the substantive constitutional claims, which were nearly precisely on point with Petitioner's claims, were ultimately resolved against the government on appeal in *Eskra v. Morton*, 524 F.2d 9 (7th Cir. 1975). The only difference between the decision in *Vessel* and in this case is that Wisconsin statute in *Vessel* was being applied to bar inheritance by right of representation through the mother, where here it is through the father.

innocent third parties...." App. at A-11. The court viewed the refusal of Congress to extend heirship status to illegitimate children claiming by right of representation as furthering that administrative process. App. at A-11. The court distinguished the decision of the Seventh Circuit in *Eskra v. Morton*, 524 F.2d 9 (7th Cir. 1975), as involving the right to inherit by right representation through one's mother, which presented wholly of different questions of proof. Considering the difficulties in proving paternity, the state could legitimately distinguish between inheritance from paternal relations versus inheritance from maternal relations. App. at A-12–13.

Petitioner Shangreau brought a timely petition for rehearing. That petition was denied without opinion in an order dated January 4, 1996. See App. at A-75.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ first, and foremost, to correct an error below. While this Court does not sit merely as an error-correcting court, it has that function and should not abjure it in this case. The decision below was wrong, surprisingly so. Existing precedents of this Court were simply not followed or misunderstood. Without intervention by this Court, that wrong will persist.

Summary reversal is an infrequent remedy, but it can (and should) be used here. Based on its existing precedent, this Court can harmonize the statutory provision at issue with the equal protection of the laws in the Due Process Clause of the Fifth Amendment by a straightforward and expedient construction of the words Congress used in defining heir under WELSA to mean heirs under Minnesota law. The law of Minnesota pertaining to the right to inherit by right of representation was then in flux, moving from an unconstitutional to a constitutional scheme. This Court can interpret § 3(l) of WELSA to permit, for purposes of intestate

succession, an illegitimate child to inherit from either the mother or father, or by right of representation through either, as the Minnesota Legislature had already provided for persons dying after December 31, 1986, when WELSA adopted Minnesota law to define the term "heir." Only the delayed effective date prevented this new provision from applying to this case.

Recognizing that summary disposition is infrequent (especially with the changes to appellate jurisdiction), Petitioner also believes this case raises an issue meriting plenary review. The case below highlights the tension between the Court's decision in *Trimble v. Gordon*, 430 U.S. 762 (1977), and *Lalli v. Lalli*, 439 U.S. 259 (1978). In *Trimble*, the court invalidated what amounted to an effective bar to inheritance by illegitimate children, while in *Lalli* the court affirmed a New York statute that required a judicial determination of paternity prior to the father's death before an illegitimate child could inherit from the estate of his of father. Yet since *Lalli* was decided, this Court has decided *Clark v. Jeter*, 486 U.S. 456 (1988), which invalidated a six year limitations period on establishing paternity. The decision in *Clark* calls into questions the effective bar upheld in *Lalli*. Lower courts have held that the means to establish paternity cannot be solely in the hands of the father. The lower courts are in conflict over whether the failure to establish paternity during the father's lifetime, which could bar intestate succession under some states' laws, can be used in federal proceedings to deny the child a right to seek social security survivor's benefits. Granting the writ would allow the Court to address whether an interest in finality in determining heirs permits the federal government or a state wholly to cut off the right of a known and acknowledged, but illegitimate child from inheriting through his father.

ARGUMENT

I. THE COURT SHOULD GRANT THE WRIT AND SUMMARILY REVERSE THE JUDGMENT BELOW, AS A TOTAL BAR CANNOT PROPERLY BE IMPOSED ON AN ILLEGITIMATE CHILD'S INHERITING THROUGH HIS FATHER

In this case it is indisputable that Richard Charles Beaupre was the son of Charles Ray Beaupre. Years earlier, Charles Ray Beaupre executed an affidavit of paternity declaring that Richard Charles Beaupre was his son. But for the definition of heir that Congress adopted for WELSA proceedings, and the timing of the death of his grandfather, Richard Charles Beaupre would have been entitled to inherit a share in the compensation Congress provided for loss of a reservation allotment. Petitioner as his sole heir, would have inherited that interest.

This unfair result would seem to have been foreclosed by the decision of this Court in *Trimble v. Gordon*, 430 U.S. 762 (1977). In *Trimble*, a child was denied the right under the Illinois Probate Act to inherit by intestate succession from the child's father. Employing an intermediate standard of scrutiny applicable in this area, id. at 767, this Court struck down that provision of the Illinois Probate Act as a violation of the Equal Protection Clause of the Fourteenth Amendment. Id. at 771. While problems of proof of paternity may exist, the Court noted, those problems did not justify the total disinheritance of illegitimate children whose fathers die intestate. Id. at 770-71. The Court stated:

> For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of

> estates or the dependability of titles to property passing under intestacy laws.

Id. at 771; see *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (Texas law could not deny right to support which legitimate children enjoyed); *Levy v. Louisiana*, 391 U.S. 68 (1968) (flat ban on right of illegitimate child to recover for parent's wrongful death struck down).

The decision below should have been controlled by *Trimble*. The administrative tribunal found proof of paternity well satisfied, app. at A-41, nor was there any issue raised regarding timeliness of Petitioner's claim. App. at A-43. That tribunal merely ruled that while Congress had forbidden an illegitimate child to inherit by right of representation through his father, the constitutionality of that total ban was outside their jurisdiction to consider. App. at A-31 and A-47–49.

The administrative tribunals appeared to invite the court below to hold § 3(l) of WELSA unconstitutional as a total statutory disinheritance proscribed by this Court in *Trimble*. Nevertheless, the court below upheld the definition of heir adopted by Congress in WELSA. It did so for two reasons, neither of which withstand even a cursory analysis.

One reason the Eighth Circuit advanced was the interest of Congress in quieting title to land. Yet in express language in § 6(a) and (b) of WELSA, Congress quieted title to land sold out of trust:

> Sec. 6. (a) ...Congress hereby does approve and ratify any such transfer effective as of the date of said transfer,....
>
> (b) By virtue of the approval and ratification of transfers of allotments or interests therein effected by this section, all claims against the United States, the State of

> Minnesota or any subdivisions thereof, or any other person or entity, by the White Earth Band, its members...shall be deemed never to have existed as of the date of the transfer, subject to the provisions of this Act.

With the enactment of those provisions, current holders of reservation land sold out of trust received clear title. To dispute title, a claimant, or his or her heirs, had to file suit within 180 days of passage of WELSA or by the time the Secretary of Interior had published notice that the preconditions to quieting title were met. See WELSA § 6(b); *Manypenny v. United States*, 948 F.2d 1057, 1059 n.4 (8th Cir. 1991) (notice requirement met on March 21, 1988). That provision is not at issue here, as Petitioner is seeking a share of the compensation Congress provided and is not contesting title to land sold out of trust.

A second justification the Eighth Circuit advanced was a congressional interest in administrative efficiency, that the process of determining heirs must end at some reasonable point in time. Yet there is no dispute that Petitioner was timely in asserting her claim. The administrative agencies merely denied her claim because the definition of heir in § 3(l) of WELSA flatly barred her claim. Timeliness was never an issue.

Likewise, proof of paternity was never an issue in this case. The administrative tribunal found that Charles Ray Beaupre during his lifetime had incontestably admitted that he was the father of Richard Charles Beaupre. On this point, however, the Eighth Circuit read *Eskra v. Morton*, 524 F.2d 9 (7th Cir. 1975) (opinion per then-Judge Stevens) as not dispositive, reading *Eskra* to leave open the issue of a bar to an illegitimate child inheriting by right of representation from paternal relations because of difficulties of proof of paternity.

Yet whatever problems of proof of paternity may exist even today, given DNA testing, that concern is merely hypothetical in this case. It is plain that the problems of proof of paternity are no longer the issue they once were. See *Clark v. Jeter*, 486 U.S. 456, 465 (1986) (problems of proof no longer overwhelming); *Little v. Streater*, 452 U.S. 1, 6-8 (1981) (discussing efficacy of paternity tests). This Court's decision in *Trimble* should control, and what the decision in *Eskra* indicates is that where problems of proof do not exist (presumptively in the case of maternal relations, or as incontestably proven here for paternal relations), a state interest in procedural efficiency and finality cannot control. That Congress did not have these interests in mind is conclusively demonstrated by the fact that, for deaths occurring after December 31, 1986, illegitimate children, on proper proof of paternity, could inherit through their fathers by right of representation. Petitioner Shangreau should be allowed to inherit her son's interest in the compensation due on the allotment sold illegally out of trust.

It is also beyond dispute that this case is outside the narrow holdings of *Lalli v. Lalli*, 439 U.S. 259 (1978), and *Labine v. Vincent*, 401 U.S. 532 (1971). In *Lalli* the court upheld a constitutional challenge to a New York statute that permitted an illegitimate child to inherit only if there had been a judicial declaration of paternity during the father's lifetime. 401 U.S. at 275-76. In *Labine*, the court upheld a Louisiana statute that required illegitimate children to be acknowledged by their fathers before they could inherit by intestate succession, but then only to the exclusion of the state. 401 U.S. at 537.

The circumstances of Ms. Shangreau's case brings it outside the holdings of *Lalli* and *Labine*. Petitioner Shangreau presented a timely claim based on well-founded, preexisting evidence of paternity, and in the administrative proceedings, there was a finding that Charles Ray Beaupre

was the father of her son, Richard Charles Beaupre. The state interest in finality in probate proceedings, which was advanced in *Lalli* to cut off the rights of unknown illegitimates, see 439 U.S. at 271-72, is not implicated here. While *Labine* sanctioned a harsh provision on intestate succession for illegitimates, there was not a total bar. Rather, this case is like the situation in *Levy* where the court invalidated a statutory compensation right (for wrongful death) that barred illegitimates from benefiting. So, too, is WELSA a statutorily created compensation right; the bar to illegitimates here is as invalid as that struck down in *Levy*.

Consequently, this is a case that the Court could exercise its power to reverse summarily the decision below. The authority of *Trimble* is beyond peradventure A total bar to inheritance such as Congress adopted in § 3(l) of WELSA is an unconstitutional discrimination against illegitimate children. The justifications the court below asserted were makeweight, insufficient to distinguish *Trimble*. See *Reed v. Campbell*, 476 U.S. 852, 855 (1986) (per curiam) (none of the reasons advanced by court below justified refusing to apply *Trimble*); *Lucas v. Handcock*, 266 Ark. 142, 145, 583 S.W.2d 491, 492 (1979) (overturning similar statute as unconstitutional under *Trimble*); *Allen v. Harvey*, 568 S.W.2d 829, 835 (Tenn. 1978) (same). Many states apparently agree, as there has been widespread adoption of the Uniform Probate Code. See VA, William F. Fratcher, Scott on Trusts § 574 (4th ed. 1989 and Supp. 1995) (listing states).

As Petitioner argued below, the Court can presume Congress meant to borrow the laws of Minnesota that were constitutional. See *Williams v. Lambert*, 902 F. Supp. 460, 463 (S.D.N.Y. 1995) (on remand, court ruled New York statute discriminating against illegitimates to be unconstitutional, as state court of appeals would likely do so if faced with issue); cf. *Fulton v. Harris*, 658 F.2d 641, 643 (8th Cir. 1981) (in social security benefits case, court refused to

borrow similar Arkansas provision in effect on date of father's death, as provision was unconstitutional under *Trimble*). To rectify the decision below, the Court can construe § 3(l) of WELSA to incorporate the provisions the Minnesota legislature had already passed. See *Lawrence ex rel. Lawrence v. Chater*, ___ U.S. ___, 116 S. Ct. 604, 605-06 (1996) (per curiam) (regarding analogous borrowing provision, federal government conceded that the constitutionality of underlying state statute should be considered in construing social security statute).

II. THE JUSTIFICATIONS SET FORTH BY THE COURT BELOW INDICATE THIS COURT SHOULD ADDRESS THE CONFLICT IN THE LOWER COURTS REGARDING WHAT DISTINCTIONS CAN PROPERLY BE DRAWN BETWEEN THE INHERITANCE RIGHTS OF ILLEGITIMATE AND LEGITIMATE CHILDREN

Should the Court be reluctant to exercise its power to reverse at this stage, there is still ample justification to grant the writ. The statutory definition of heir that Congress adopted in § 3(l) of WELSA created a flat prohibition on illegitimate children from inheriting through their fathers by right of representation. The court below read the *Trimble* decision as leaving open this issue, because of difficulties of proof of paternity. In support of its decision, the lower court asserted the interest of the federal government in quieting title and administrative efficiency and finality in determining who were proper heirs to compensation under WELSA.

In *Trimble* the Court addressed the issue of inheriting by intestate succession from a child's father. Its decision in *Trimble* rested on an equal protection analysis that focused on "whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state

objectives." 430 U.S. at 774. While the level of scrutiny used was not the Court's "`most exacting,'" id. at 767 (quoting *Matthew v. Lucas*, 427 U.S. 495, 506 (1976)), its review was "`not a toothless one,'" id. (quoting *Lucas*, 427 U.S. at 510)). The Court determined that the statute had to consider something at least "between the extremes of complete exclusion and case-by-case determination of paternity." Id. at 771. In this case, as in *Trimble*, the fact of paternity was settled before death. See id. at 772. The sole distinction between this case and *Trimble* is that here the right to inherit is by right of representation through the father, as opposed to taking from the estate of the father.

Since *Trimble* was decided, various courts have addressed several aspects of the state interests on which the court below relied to uphold § 3(l) of WELSA. For instance, in *Clark v. Jeter*, 486 U.S. 456 (1988), this Court, in a unanious opinion, struck down a six year statute of limitations on actions to establish paternity, reasoning that with scientific advances in paternity testing, the state's interest in avoiding litigation of stale or fraudulent claims was insufficient to justify that short a period. Id. at 464-65; accord *Pickett v. Brown*, 462 U.S. 1 (1983) (two year limit on bringing paternity actions invalid); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (one year limit on paternity actions invalid).

The analytical difficulties left by the narrow differences in *Trimble* and *Lalli* continue to plague the lower courts. For instance, in *Daniels ex rel. Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992), the court was confronted with a claim for social security survivor's benefits brought by a mother on behalf of her illegitimate son. Under federal law, the rights of the child to such benefits depended on the child's rights to intestate succession under state of the decedent's domicile (Georgia in that case). Because the child had failed to establish paternity in his father's lifetime, he could not inherit under state law. Despite clear proof of such paternity, the

government argued *Lalli* controlled and that the claim should be disallowed, id. at 1521, a contention the court rejected. Id. at 1521-22. The court distinguished *Lalli* as resting on a state's interest in orderly deposition of property at death, an interest that did not apply in the social security context. Accord *Handley ex rel. Herron v. Schweiker*, 687 F.2d 999 (11th Cir. 1983). Other courts of appeal have disagreed with *Daniels* and *Handley*. See *Haas v. Chater*, ___ F.3d ___, 1996 WL 97454, at *4 (7th Cir. Mar. 6, 1996) (Posner, J.) (discussing conflicts among circuits on whether a state statute is unconstitutional if, as applied, it makes proof of paternity impossible in federal social security context).

Likewise, courts have held that the procedures for establishing paternity cannot rest solely in the control of the father. See *Veeney ex rel. Strother v. Sullivan*, 973 F.2d 326 (4th Cir. 1992); *Cox v. Schweiker*, 684 F.2d 310 (5th Cir. 1982). To do so would leave the mother or the child without recourse in the event of the father's death before taking steps to establish paternity, as well as allowing an unwilling father to escape his obligations. What the decisions *Clark*, *Veeney* and *Cox* indicate is that neither the state's interest in preventing stale or fraudulent claims nor problems of proof are sufficient to limit a mother or child from establishing paternity, even long after birth.

The interest of a state in orderly disposition of property after death seems to remain the sole state interest to survive scrutiny. Yet the New York statute at issue in *Lalli* is suspect, given the decision in *Clark*, as it required a judicial determination of paternity before death. If *Clark* holds a child cannot be required to establish paternity before his or her majority, then neither should a state require paternity to be established before death in order to inherit by intestate succession. At least an illegitimate child should be allowed to intervene in a probate proceeding before they become final in order to establish paternity.

Certainly the requirements of the WELSA provision at issue cannot be reconciled against the holdings in *Daniels*, *Veeney* and *Cox*. A state certainly has an interest in orderly disposition of property at death, but that interest cannot justify a total ban on an acknowledged illegitimate child inheriting by right of representation. Yet the court below thought so. This Court should grant the writ to bring *Lalli* into harmony with *Trimble* and more recent court decisions. See *Haas*, ___ F.3d at ___, 1996 WL 97454 at *6.

III. THE ISSUE RAISED BY THIS CASE IS A RECURRING ONE

The questions regarding what distinction can be drawn between the rights of illegitimate children vis-a-vis legitimate children continues to be important. This court has on several occasions addressed this issue. The lower courts face the validity of distinctions legislators have drawn regularly. The issue arises where federal law borrows from state law, as in the social security context. It comes up in other contexts. See, e.g., *Williams v. Lambert*, 902 F. Supp. 460 (S.D.N.Y. 1995) (right to sue for increased child support). In the heirship context, as in this case, the vestiges of pre-*Trimble* statutory schemes exist. There are several other similarly affected WELSA claimants as Ms. Shangreau, and as the *Haas* decision indicates, the situation created by *Lalli* recurs regularly, where there are no judicial paternity proceedings (or equivalent) undertaken before death. Thus, granting the writ will allow the Court to address a recurring issue national in scope.

CONCLUSION

In adopting WELSA, Congress acted to correct an 80 year old wrong. The decision below undercuts that purpose. There is no justification for completely cutting off the rights of illegitimates to inherit by way of representation an interest in the compensation Congress provided.

Thus, the Court should either summarily reverse or take this case up for plenary review to resolve the conflicting decisions in this area.

Dated: April 3, 1996

Respectfully submitted,

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INDEX TO THE APPENDIX

Decision of the Court of Appeals A-1

District Court Memorandum Opinion and Order A-14

Interior Board of Indian Appeals
Order Affirming Decision A-30

ALJ Final Order Determining Heirs A-36

ALJ Order Disallowing Objections A-43

White Earth Land Settlement Act of 1985 ..... A-55

Order Denying Petition for Rehearing A-75

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 94-4080

Mabel Shangreau, Appellant, v. Bruce Babbitt, Secretary of the United States Department of the Interior, Appellee.	*	Appeal from the United States District Court for the District of Minnesota

Submitted: June 14, 1995

Filed: October 4, 1995

Before McMILLIAN, BRIGHT and LOKEN, Circuit Judges.

MCMILLIAN, Circuit Judge.

Mabel Shangreau appeals from, a final order entered in the District Court[1] for the District of Minnesota granting summary judgment in favor of the federal government on her claim that the definition of "heir" in the white Earth Land Settlement Act of 1985 (WELSA or the Act), as amended, 25

[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

U.S.C. § 331 note, incorporating Minn. Stat. § 525.172 (1984) (repealed effective Jan. 1, 1987), invidiously discriminates against illegitimate[2] children in violation of the due process clause of the fifth amendment. Shangreau v. Babbitt, Civil No. 3-94-103 (D. Minn. Oct. 25, 1994) (memorandum opinion and order). For reversal, Shangreau argues the illegitimacy classification is not substantially related to any permissible governmental interest. For the reasons discussed below, we affirm the judgment of the district court.

The memorandum opinion of the district court contains a detailed statement of the historical background and underlying facts.

HISTORICAL BACKGROUND

A series of treaties between the Chippewa Indian Tribe and the United States led to the creation in 1879 of the White Earth Reservation in northwestern Minnesota. In 1887 Congress began breaking up Indian reservations and granting allotments or parcels of land to individual Indians through "trust patents." Indian General Allotment Act of 1887 (Dawes Act), 24 Stat. 388, codified as amended, in scattered sections, at 25 U.S.C. § 331 et seq. In 1889 Congress applied the allotment policy to the White Earth Reservation. Each full- or mixed-blood allottee received a trust patent under which the United States would hold the allotted land in trust for 25 years before conveying title in fee to the allottee. During the trust period each allotment was tax-exempt and could not be alienated or encumbered without the approval of the Secretary of the Department of the Interior. Over nearly 20 years the federal government issued about 8,000 allotments. Through

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[2] Like the parties and the district court, we use the term "illegitimate" to describe a child whose parents who were not married to one another at the time of the child's birth.

executive orders, the trust periods applicable to most White Earth Reservation allotments were repeatedly extended.

In the Appropriation Acts of 1906 and 1907, Congress enacted the Clapp Amendment which purported to remove all restrictions on the sale, encumbrance or taxation of land allotted to adult mixed-blood Indians on the White Earth Reservation. The Clapp Amendment resulted in the rapid transfer to non-Indians of much of the reservation land from Indians who had been granted fee simple ownership. By 1909, 90% of the lands allotted to full-blood Indians had been sold or mortgaged, and 80% of reservation land was owned by non-Indians. Courts interpreting the Clapp Amendment emphasized its distinction between full- and mixed-blood Indians and concluded that the Clapp Amendment had terminated the trust relationship between the federal government and mixed-blood Indians but not that between full-blood Indians and the federal government. In 1915 an opinion of the Solicitor of the Department of the Interior agreed with this interpretation and concluded that the Department of the Interior did not have jurisdiction to determine the heirs of adult mixed-blood Chippewas after 1906 because the Clapp Amendment had terminated the trust relationship between the United States and such individuals. As a result, Minnesota state courts assumed the probate function.

However, in Morrow v. United States, 243 F. 854 (8th Cir. 1917), this court suggested that the Clapp Amendment could not unilaterally terminate the trust relationship and thus cast doubt upon the validity of many land transfers made between 1906 and 1917. The Department of Justice had made only limited efforts to bring suit on behalf of Indians whose lands had been illegally conveyed. This lack of enforcement action continued despite successive extensions of the trust period.

The Indian Reorganization Act of 1934, 48 Stat. 984, codified as amended, in scattered sections, at 25 U.S.C. § 461 et seq., extended indefinitely all trust periods then in existence. By this time, however, most of the allotments had already been sold, lost through tax forfeiture or otherwise alienated.

In the late 1970s several events forced a change in the federal government's treatment of Indian land claims. In State v. Zay Zah, 259 N.W.2d 580 (Minn. 1977), cert. denied, 436 U.S. 917 (1978), the Minnesota Supreme Court held that the Clapp Amendment could not unilaterally abrogate the trust status of a White Earth allotment. In 1979 the Solicitor of the Department of the Interior overruled the 1915 opinion interpreting the Clapp Amendment and directed the Department to determine the heirs of any White Earth mixed-blood Chippewa who died holding a beneficial interest in a White Earth trust allotment. The Solicitor also interpreted State v. Zay Zah to invalidate title acquired through tax forfeiture, state probate awards and other forms of involuntary, alienation, including purchase without the approval of the Secretary of the Department of the Interior from mixed-blood Chippewas under 21 years of age. The combined effect of State v. Zay Zah and the 1979 Solicitor's opinion was to cloud title to more than 100,000 acres in several Minnesota counties.

In 1986 Congress resolved the title problems by enacting WELSA. Under WELSA the federal government paid compensation to the heirs of the allottees in exchange for the land. WELSA directed the Secretary of the Department of the Interior to determine the allottees or heirs entitled to receive compensation and to proceed to make such heirship determinations as may be necessary to provide such notice of compensation. Section 8 (c) of the Act provides that the Secretary shall accept as conclusive evidence of heirship any determination of the courts of the state of Minnesota as provided in section 5 (a) of this Act. Section 5 (a) deals with

determination of heirs of the original allottees. In the process of developing procedures for determining who would be entitled to receive notices of compensation, the Bureau of Indian Affairs (BIA) analyzed which laws would be applicable to any heirship determinations. The BIA concluded that the laws relating to the inheritance of personal property in effect in the jurisdiction in which a decedent was domiciled on the date of death would likely be applicable. The prospect of applying the intestate succession laws of perhaps all 50 states, and possibly several foreign countries, over a period of more than 80 years prompted the BIA to request Congress to narrow the scope of the applicable laws.

On November 5, 1987, in response to the BIA request, Congress enacted the Indian Law Technical Amendments Act of 1987 (the 1987 Act), Pub. L. No. 100-153, 101 Stat. 886. Section 6 (a) of the 1987 Act expanded the definition of "heir" in section 3(*l*) of WELSA to provide:

> a person who received or was entitled to receive an allotment or interest as a result of testate or intestate succession under applicable Federal or Minnesota law, or one who is determined under section 9, by the application of the inheritance laws of Minnesota in effect on March 26, 1986 [the date of the enactment of WELSA] . . . , to be entitled to receive compensation payable under section 8.

As explained by the Assistant Secretary for Indian Affairs, the effect of § 6 (a) of the 1987 Act was that the Secretary could apply the laws of the Minnesota as of the date of the enactment of WELSA instead of the laws of many different jurisdictions at various points in time.

Pursuant to Minn. Stat. § 525.16 (1), (4) (a), a one-third share of personal property descends to the surviving spouse and the balance of the estate descends "[i]n equal shares to the

surviving children and to the issue of deceased children by right of representation." Minn. Stat. § 525.172 (1984) (repealed effective Jan. 1, 1987) (emphasis added), provided that:

> (a] child born to a mother who was not married to the child's father when the child was conceived nor when the child was born shall inherit from the mother the same as if the child was conceived or born to her while she was married, and also from the person who in writing and before a competent witness shall have declared himself to be the child's father, provided such writing or an authenticated copy thereof shall be produced in the proceeding in which it is asserted or from the person who has been determined to be the father of such child in a paternity proceeding before a court of competent jurisdiction; but such child shall not inherit from the kindred of the father by right of representation.

However, on May 29, 1985, the Minnesota legislature adopted the Uniform Probate Code (UPC) and repealed Minn. Stat. § 525.172 for estates of decedents dying after December 31, 1986. Act of May 29, 1985, ch. 250, § 27, 1985 Minn. Laws 851 (effective Jan. 1, 1987). The replacement statute, Minn. Stat. § 524.2-109, provides that "a person is the child of the person's parents regardless of the marital status of the parents and the parent and child relationship may be established under the parentage act, sections 257.51 to 257.74." Thus, on November 5, 1987, the date Congress passed the 1987 Act, the Minnesota inheritance law in effect on that date did not bar an illegitimate child from inheriting by

right of representation through the father. However, the Minnesota inheritance law in effect on the date specified by the 1987 Act for application of the Minnesota inheritance laws, March 26, 1986, the date of the enactment of WELSA, did bar such inheritance.[3] We turn now to the facts in the present case.

BACKGROUND FACTS

The facts are not in dispute. in administrative proceedings to determine heirship, the administrative law judge (ALJ) determined that the original White Earth allottee of the land in question was Lizzie Pemberton Beaupre Blair (her Chippewa name was Mo-kah-ah-mo-aince), allottee No. 0-3420; she died on May 3, 1974. She had improperly transferred her allotment on July 30, 1908, when she was under the age of 21, and thus her heirs were entitled to compensation, with interest from the date of the taking, as of that date. Richard C. Beaupre was one of her heirs and entitled to receive a one-seventh interest in the compensation to which she would have been entitled. Richard C. Beaupre died on August 1, 1986, in Minnesota; he was survived by his second wife, Philomene E. Azure Beaupre, and their three sons. Richard C. Beaupre also had a son, Charles Roy Beaupre, from his first marriage. Charles Roy Beaupre died on March 12, 1976; he was survived only by his illegitimate son, Richard Charles Beaupre. Shangreau is his mother; she and Charles Roy Beaupre were not married at the time he was born on October 22, 1973, and they never subsequently married. However, in an affidavit of paternity

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[3] The Secretary of the Department of the Interior has acknowledged the "harsh effect" of the former law with respect to inheritance by right of representation through the father. In 1991 the Department stated that it was considering proposing a technical amendment to WELSA to allow application of the new state law. However, according to the briefs, no such amendment has been passed at this time.

signed November 1, 1973, Charles Roy Beaupre acknowledged that Richard Charles Beaupre was his son. Richard Charles Beaupre died on March 1, 1992, without descendants. It is not disputed that Richard Charles Beaupre was Charles Roy Beaupre's son and Richard C. Beaupre's grandson.

The ALJ applied Minn. Stat. § 525.172, as incorporated by the 1987 Act, and concluded that because Richard Charles Beaupre was an illegitimate child whose father had predeceased him, he could not inherit by right of representation from his paternal grandfather, Richard C. Beaupre. The ALJ also decided that she had no jurisdiction to consider the constitutionality of the Minnesota inheritance law. Shangreau appealed the heirship determination to the Interior Board of Indian Affairs (the Board). The Board affirmed the decision of the ALJ and did not consider the constitutional challenge on the ground that it lacked jurisdiction to do so. In re WELSA Heirship Determination of Richard C. Beaupre, 25 I.B.I.A. 133, 134 (1994). Shangreau then filed this case in federal district court.

DISTRICT COURT DECISION

As a threshold matter, the district court held that it had subject matter jurisdiction under 28 U.S.C. § 1331 over Shangreau's constitutional challenge to the heirship determination. Slip op. at 8 & n.8.

Shangreau first argued that on March 26, 1986, the date of the enactment of WELSA, two statutes on intestate succession, Minn. Stat. § 525.172 which barred an illegitimate child from inheritance by right of representation from the father and Minn. Stat. § 524.2-109 which did not (after establishment of the parent-child relationship), were in effect in Minnesota and that both statutes had been incorporated into WELSA by the 1987 Act. The district court, however,

rejected this argument and agreed with the federal government that the only Minnesota inheritance statute in effect on March 26, 1986, the date of the enactment of WELSA, was the pre-UPC statute, Minn. Stat. § 525.172, which barred an illegitimate child from inheriting- from the kindred of the father by right of representation. Slip op. at 10.

On the merits, Shangreau argued that WELSA invidiously discriminated against illegitimate children because the bar against inheritance by right of representation through the father was not substantially related to a permissible governmental interest. The district court disagreed and held that the bar against inheritance by illegitimate children by right of representation through the father was substantially related to interests served by WELSA. Id. at 16. Given the problems of identification and proof, granting heirship status to illegitimate children claiming by right of representation through the father would impose an administrative burden on the settlement process. Id. The district court also held that there is a logical relationship between the federal government's evident and substantial interest in accurately and efficiently settling claims to the disputed lands in Minnesota and WELSA's treatment of illegitimate children in determining their heirship status. Id. at 16-17. The district court granted summary judgment in favor of the federal government and dismissed Shangreau's complaint with prejudice. This appeal followed.

JUDICIAL REVIEW

As a preliminary matter, we agree with the district court that federal courts have subject matter jurisdiction under 28 U.S.C. § 1331 to hear a constitutional challenge to Indian heirship determinations and that judicial review of constitutional claims arising from such proceedings is not barred by 25 U.S.C. § 372. Cf. Kicking Woman v. Hodel, 878

F.2d 1203, 1205-07 (9th Cir. 1989) (constitutional challenge is an exception to 25 U.S.C. § 372's general bar to federal judicial review of merits of heirship determinations); Eskra v. Morton, 524 F.2d 9, 12 n.6 (7th Cir. 1975). Shangreau's constitutional challenge falls within this narrow exception to the statutory bar against judicial review.

MERITS

Shangreau argues that the definition of heir in WELSA, which has the effect of completely barring illegitimate children from intestate inheritance by right of representation through the father, invidiously discriminates against illegitimate children, in violation of the due process clause of the fifth amendment. She argues that nothing in the text of WELSA, the 1987 Act and the legislative history indicates that Congress intended to discriminate against illegitimate children in heirship determinations. Shangreau argues that the definition of heir is not substantially related to any permissible governmental interest. She specifically distinguishes Lalli v. Lalli, 439 U.S. 259 (1978), which held a similar bar to intestate inheritance by illegitimate children from the father did not violate equal protection, on the grounds that title, to land or property is not at issue in WELSA proceedings, there are no problems about identification or service of unknown illegitimate children, and there is no dispute about paternity. She also cites in support Eskra v. Morton, 524 F.2d at 14, which held that there was no justification for the federal government to bar an illegitimate child from inheriting by right of representation through the mother.

'[C]lassifications based on illegitimacy . . . are invalid under the Fourteenth Amendment [and the due process clause of the fifth amendment] if they are not substantially related to permissible [governmental] interests." Lalli v. Lalli, 439 U.S. at 265. In that case a state statute allowed an illegitimate child

to inherit from the father only if the paternity of the father was declared in a judicial proceeding before the father's death. The Supreme Court held that the different treatment of paternal inheritance by illegitimate children was justified by the "peculiar problems of proof" of paternity as opposed to maternity, id. at 268-69, and was substantially related to the important state interest in the just and orderly disposition of property at death. Id. at 271-75.

Here, the federal government has an interest in the definitive and fair determination of heirship disputes so it can distribute the compensation funds and thereby extinguish any potential claims that the heirs of a White Earth allottee might have and thus clear title for innocent third parties who presently own or may own the former allotments in the future. This interest is analogous to the state's interest in the just and orderly disposition of property at death articulated in Lalli v. Lalli, 439 U.S. at 268. The definition of heir in WELSA bars an illegitimate child from inheriting by right of representation through the father but not through the mother. As in Lalli v. Lalli, the peculiar problems of proof of paternity as opposed to maternity justify the different treatment of paternal inheritance by illegitimate children under WELSA. Refusing to expand heirship status to include illegitimate children claiming by right of representation through their fathers is substantially related to the federal government's important interest in accurately and efficiently-settling the claims involving the White Earth Reservation allotments.

Eskra v. Morton supports this holding. In that case a Chippewa Indian named Blue Sky died intestate in Wisconsin in 1964. She held an interest in Indian Trust Land in Wisconsin which, by federal statute, passed to her heirs as determined by the laws of Wisconsin. She was not survived by any children, spouse or parents. Her collateral relatives included three daughters of a predeceased niece, Florence. The oldest daughter, Constance, was illegitimate; the two

younger daughters were legitimate. Applying the law of Wisconsin in effect on the date of Blue Sky's death, the ALJ found that Constance's two sisters were each entitled to a share of their great-aunt's estate but that Constance was entitled to nothing. The applicable Wisconsin law allowed an illegitimate child to share equally with legitimate children in the estate of their mother and the father if the father acknowledged paternity or was adjudged to be the father, but excluded the illegitimate child from any share in the estate of any relative of either the mother or the father. Thus, the illegitimate child could inherit from, but not through, either the mother's or the father's estate. The district court upheld the statute. The court of appeals reversed.

The court of appeals noted that the state's interest in prompt and certain determinations of property ownership could justify the exclusion of an illegitimate child from a share of the father's estate, given the serious problems in proving paternity in cases involving inheritance from the father that are absent in cases involving inheritance through the mother. 524 F.2d at 14. The court of appeals further noted that '[t]he state's interest in certainty is manifestly different in a case involving the right of an illegitimate to participate in her father's estate, than in one in which the right to share in the mother's estate, or to take through the mother, is involved." Id. The court of appeals even suggested that 'the variety of situations in which natural fatherhood might be disputed makes it permissible to treat all cases involving fathers as distinguishable from all cases involving mothers." Id. (footnote omitted). The court of appeals thus concluded that the state's interest in certainly did not justify the exclusion of an illegitimate child from a share of the mother's estate or in the estate of a collateral of the mother. Id.

Eskra v. Morton thus supports different treatment of inheritance through the mother and inheritance through the father. The court of appeals did not hold the statute with

respect to fathers was unconstitutional. of course, given the facts in the case, the court of appeals did not have to reach that part of the statute. Nonetheless, the analysis in Eskra v. Morton is consistent with our holding that the peculiar problems of proof of paternity as opposed to maternity justify the different treatment of paternal inheritance by illegitimate children.

We hold the definition of heir in WELSA does not invidiously discriminate against illegitimate children. Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Mabel Shangreau,

Plaintiff,

vs.

Civil No. 3-94-103
MEMORANDUM OPINION
AND ORDER

Bruce Babbitt, Secretary
of the Department of the
Interior,

Defendant.

Charles H. Thomas, Southern Minnesota Regional Legal Services, Inc., Mankato, Minnesota, for plaintiff.

Robert M. Small, Assistant United States Attorney, Minneapolis, Minnesota., for defendant.

Introduction

Before the Court are cross-motions for summary judgment[1] on the sole issue of whether the provision in the White Earth Land Settlement Act ("WELSA") for ascertaining heirs, 25 U.S.C. § 331 note (1989), denies the plaintiff equal protection of the laws by discriminating against individuals on

[1] It appears from the record, and the parties agree, that there are no genuine issues of material fact in this matter; accordingly, the Court will resolve the present controversy in the context of these cross motions.

the basis of their birth status. Plaintiff Mabel Shangreau seeks this Court's review of the defendant's final agency determination that Shangreau's deceased son is not an heir of his grandfather because, pursuant to WELSA's definition of "heir," an illegitimate child cannot inherit by right of representation through his father. For the reasons set forth below, the Court holds that the statutory provision being challenged does not violate the equal protection guarantees of the Constitution.

Background

I. Factual History

A. The White Earth Reservation and the White Earth Land Settlement Act (WELSA).

President Rutherford Hayes created the White Earth Reservation, consisting of over 825,000 acres of land in northwestern Minnesota, by executive order on March 18, 1879.[2] In the late nineteenth century, Congress embarked upon a policy of "allotment," by which each individual qualified tribal member who lived on a reservation would receive a parcel of land to be held by the United States in trust for twenty-five years. See generally General Allotment ("Dawes") Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 et seq.). During the trust period, no taxes or assessments could be imposed on the land, and no

[2] As part of the Treaty of March 19, 1867, the United States had promised the Chippewa Indians of the Mississippi, in exchange for the Indians' cession of certain lands in Minnesota, that an area would "be set aside for the Minnesota Chippewas 'in order to provide a suitable farming region for the . . . bands'" who signed the treaty. S. Rep. No. 192, 99th Cong., 1st Sess. (1985) at 2 (quoting Treaty of March 19, 1867, 16 Stat. 719).

conveyance or encumbrance of the land would be valid unless approved by the Secretary of the Interior; at the conclusion of the trust period, the allottee would be free to alienate his or her land. S. Rep. No. 192, 99th Cong., 1st Sess. (1985) at 4 (hereinafter 'S. Rep. No. 192']. The first trust patents for lands within the White Earth Reservation were issued in 1902; numerous other patents were issued in 1907 and 1908.[3] Id.

Due to increasing pressure for access to Indian lands and the timber they contained, Congress altered the course of allotment on the White Earth Reservation through a series of statutes enacted during the first decade of this century. In 1904, Congress authorized the Indians of the White Earth Reservation to sell the standing timber on their allotments -- with the approval of the Secretary of the Interior -- independently from sale of the allotment itself.[4] The Burke Act, passed by Congress in 1906, empowered the Secretary of the Interior to issue unfettered ownership and legal title, prior to the expiration of the twenty-five year trust period, to those Indian allottees whom the Secretary determined to be 'competent and capable of managing his or her affairs." Finally, and most significantly, a provision in the Appropriations Acts of 1906 and 1907, known as the Clapp Amendment, removed all restrictions from allotments previously made or made in the future to 'mixed bloods" on

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[3] Executive Orders signed in 1927, 1932 and 1933 extended the trust periods for the patents issued in 1902, 1907 and 1908 for another ten years. The Indian Reorganization Act of 1934 extended indefinitely all trust periods then in existence, including those which had been extended by Executive Order. S. Rep. No. 192, at 9.

[4] "At this time, the laws of the State of Minnesota prohibited any one company or person from owning more than 5000 acres of timberland. The authorization for the separate sale of timber coupled with the additional allotment of timberland to the Indians of White Earth opened the door for circumventing this state law." S. Rep. No. 192, at 5 (emphasis added).

the White Earth Reservation; adult mixed blood Chippewa received their allotments in fee simple.[5] See generally id. at 4-5.

By 1913, one report estimated that "fully 90 percent of the lands allotted to full-blood Indians had been sold or mortgaged, and fully 80 percent . . . of the lands on the reservation had passed into the hands of private ownership.'" Id. at 6 (citation omitted). Approximately 290 allotments made to mixed blood Chippewa were sold by the allottees prior to their having attained the age of majority without the Department of the Interior's approval. Id. at 10. In the 1970s, the Department of the Interior identified several categories of problematic titles for lands on the White Earth Reservation which affected over 100,000 acres within the reservation. Id. at 10-11, 19-20.

Congress enacted WELSA on March 24, 1986, because

> claims on behalf of Indian allottees or heirs and the White Earth Band involving substantial amounts of land within the White Earth Indian Reservation in Minnesota are the subject of existing or potential lawsuits involving many and diverse interests in Minnesota and are creating great hardship and uncertainty for government, Indian communities, and non-Indian communities.

Pub. L. 99-264, § 2, 100 Stat. 61, 61 (1986) (codified at 25 U.S.C. § 331 note (1989)). Through WELSA, Congress sought to secure a fair and equitable final settlement of these

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[5] The term "mixed blood" is not defined in the Act or in the legislative history, nor did the statute provide a means of establishing "mixed blood" status. In an effort to avoid that problem, "many of the mortgages or documents of sale had attached affidavits from the Indian owner attesting to his or her mixed blood status, often the signature consisting only of the Indian's thumb print." S. Rep. No. 192, at 5-6.

unresolved claims and to avoid great expense and expenditure of time. Id.

As part of the statute's remedial scheme, section 9 of WELSA requires the Secretary to determine the heirs of the original allottees wherever necessary to effectuate complete compensation.[6] As one representative of the Interior Department's Division of Indian Affairs observed, however:

> [b]ecause of the passage of time, the administrative tasks of probating estates and determining and locating heirs of White Earth allottees will be an enormous and costly undertaking, requiring many years to complete. The difficulty of these tasks is compounded by the fact that many of the heirs who would be entitled to compensation under the bill's legislative scheme are scattered throughout the country and are not members of the White Earth Band or any other Indian tribe.

Hearing on S. 1396 Before the Select Committee on Indian Affairs, United States Senate, 99th Cong., 1st Sess. 90 (statement of Tim Vollmann, Associate Solicitor, Division of Indian Affairs, Department of the Interior). On November 5, 1987, Congress amended the WELSA's definition of "heir," for purposes of determinations made under section 9, to mean a person who would be so classified under 'the inheritance laws of Minnesota in effect on March 26, 1986." Indian Law Technical Amendments of 1987, Pub. L. 100-153, sec. 6(a), § 3(l), 101 Stat. 886, 887.

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[6] Pursuant to section 5(a) of WELSA, Minnesota probate court determinations of heirs were deemed affirmed unless the Secretary of the Interior performed a separate determination of heirs and notified the proper county recording office within six months after the bill was enacted.

B. Plaintiff Shangreau's Claim

The administrative law judge, Sandra Massetto, found that the original allottee of the parcel in question here, Mo-kah-ah-mo-quaince or Lizzie Pemberton Beaupre Blair, would be entitled to compensation under section 4(a)(2) of WELSA.[7] Judge Massetto also determined that one-seventh of her interest in the allotment would pass to Richard C. Beaupre, the decedent at issue in this dispute. The administrative law judge found that the decedent had been married twice. By his first marriage to Margaret Rain, which ended in divorce in 1953 or 1954, he had one son, Charles Roy Beaupre. By his second marriage to Philomene Azure, he had three sons. The decedent died August 1, 1986, at the age of seventy-four. He had been predeceased by his eldest son, Charles Roy Beaupre, who died on March 12, 1976.

Judge Massetto also found that Charles Roy Beaupre had one son, Richard Charles Beaupre, born to the plaintiff, Mabel Shangreau; Charles Roy Beaupre was not married to Mabel Shangreau at the time of her pregnancy and never subsequently married her. Charles Roy Beaupre acknowledged in an affidavit of paternity signed November 1, 1973, that Richard Charles Beaupre was his son. Richard Charles Beaupre died on March 1, 1992. Judge Massetto determined, pursuant to WELSA's definition of "heir" which incorporates by reference Minnesota's inheritance laws, that Richard Charles Beaupre was not entitled to share in that portion of the compensation for Mo-kah-ah-mo-quaince's allotment which the decedent would have received.

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[7] Section 4 (a) (2) of WELSA applies the provisions of the act to "allotments which were sold or mortgaged during the trust period, without the approval of the Secretary, by the allottees prior to having attained the age of majority, and were never again sold or mortgaged either by the allottees upon their having attained majority or by heirs of the allottees." 25 U.S.C. § 331 note.

II. Procedural History

Judge Massetto initially found that there was insufficient evidence to determine the paternity of Richard Charles Beaupre and that Richard Charles Beaupre could not be classified an heir of the decedent. Order of Preliminary Determination of Heirs (Def.'s Exh. 1). Plaintiff Shangreau filed objections and submitted additional documentation including the affidavit of paternity. Judge Massetto found that, although Richard Charles Beaupre was the son of Charles Roy Beaupre, he was an illegitimate son; accordingly, the judge concluded that Richard Charles Beaupre could not be deemed an heir of the decedent. Final order Determining Heirs, April 30, 1993, at 4. (Pl.'s Exh. 2.) Judge Massetto also ruled that she lacked the jurisdiction to pass on the constitutionality of the heirship provisions of the statute. Order Disallowing Objections, April 30, 1993 (Def.'s Exh. 1).

Pursuant to 43 C.F.R. § 4.356 (1993), Shangreau appealed to the Interior Board of Indian Appeals ("the IBIA"). By a decision issued January 19, 1994, the IBIA affirmed the administrative law judge's determinations and also declined to consider plaintiff's constitutional challenge on the grounds that it lacked authority to do so. In re WELSA Heirship Determination of Richard C. Beaupre, 25 IBIA 133, 134 (Jan. 19, 1994) (No. IBIA 93-89-W). Plaintiff then filed suit in this Court.

Analysis

I. Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1331.

Plaintiff has alleged a claim under the Due Process Clause of the Fifth Amendment, thus raising a federal question, and there

is no clear statement of a congressional purpose to bar judicial review of the constitutional question.[8]

II. The Constitutionality of WELSA's Heirship Provision.

A. Construing the definition of "heir".

The term "heir" is defined in section 3(l) of WELSA,[9] as a person who received or was entitled to receive an allotment or interest as a result of testate or intestate succession under applicable Federal or Minnesota law, or one who is determined under section 9, by the application of the inheritance laws of Minnesota in effect on March 26, 1986. . . to be entitled to receive compensation.[10]

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[8] This Court does not have jurisdiction under § 8 of WELSA, which involves the adequacy of the compensation awarded for a claim under the statute; no compensation has been awarded here. Nor does this Court have jurisdiction under other provisions in Title 25 cited in plaintiff Is memorandum; they deal with the distribution of trust lands held by the Secretary for deceased Indians. See 25 U.S.C. §§ 372, 373 (1989).

[9] Defendant has suggested that this Court should certify to the Attorney General for the State of Minnesota the question of whether Minn. Stat. § 525.172 is constitutional and should allow the state an opportunity to intervene pursuant to 28 U.S.C. § 2403(b) and Federal Rule of Civil Procedure 24(c). The Court concludes that certification is unnecessary. The alleged constitutional violation arises from the terms and operation of the federal statute, WELSA. That Congress chose to use a shorthand device, "the inheritance laws of Minnesota in effect on March 26, 1986," rather than setting forth in detail individual provisions relating to intestate succession does not alter the fact that Congress's actions -- not the Minnesota Legislature's -- are being complained of before this Court.

[10] In regulations promulgated on December 3, 1991, the Department noted the harshness of the Minnesota inheritance law in effect on March 26, 1986, and stated its intent to seek a technical amendment to WELSA to alleviate that harshness. Accordingly, the Department omitted specific references to Minn. Stat. 525.172 from its regulations so that, if a

Before addressing the constitutionality of the provision, the Court must first resolve the parties' dispute concerning what law was "in effect" on March 26, 1986. Plaintiff contends that, as of that date, there were two statutes on intestate succession in Minnesota: (1) the modified common-law approach codified at Minn. Stat. § 525.172, applicable to persons who died on or before December 31, 1986, which prohibited illegitimate children from inheriting by right of representation through their fathers; and (2) the Uniform Probate Code ("UPC"), adopted by the Minnesota Legislature in 1985 and applicable to persons who died after December 31, 1986, which removed the limitation on inheritance by right of representation placed upon illegitimate children. Plaintiff contends that both were incorporated into WELSA.

Defendant argues that only one statute was "in effect" on March 26, 1986 -- the pre-UPC version which applied to all those dying on or before December 31, 1986. The Court agrees. It is clear that the Minnesota legislature intended that the UPC, although passed in 1985, would not take effect until January 1, 1987. It would run counter to the plain meaning of the effective date provision of the UPC legislation to construe that statute as plaintiff urges the Court to do.[11] The Court finds that the provisions Congress incorporated by reference into WELSA were the pre-UPC statutes, and a construction of the statute is not available by which the constitutional question may be avoided. See Califano v. Yamasaki, 442 U.S. 682, 693, 99 S. Ct. 2545, 2553 (1979).

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technical amendment were passed, there would be no need to amend the regulations as well. To date, no technical amendment has been passed.

[11] Even if the two intestacy statutes were "in effect" on March 26, 1986, the UPC would not, by its terms, apply in this case because the decedent, Richard C. Beaupre, died in Minnesota on August 1, 1986, prior to the UPC's effective date.

Under Minnesota's pre-UPC intestacy laws, a surviving spouse, if any, was entitled to receive one-third of the decedent's personalty, the balance to be distributed '[i]n equal shares to the surviving children and the issue of the deceased by right of representation." Minn. Stat. § 525.16., subds. (1) and (4)(a) (1984). With respect to the inheritance rights of illegitimate children, the statute provided:

> A child born to a mother who was not married to the child's father when the child was conceived nor when the child was born shall inherit from the mother the same as if the child was conceived or born to her while she was married, and also from the person who in writing and before a competent witness shall have declared himself to be the child's father, provided such writing or an authenticated copy thereof shall be produced in the proceeding in which it is asserted or from the person who has been determined to be the father of such child in a paternity proceeding before a court of competent jurisdiction; but such child shall not inherit from the kindred of the father by right of representation.

Minn. Stat. § 525.172 (1984) (emphasis added), repealed by Act of May 29, 1985, ch. 250, § 27, 1985 Minn. Laws 851 (effective January 1, 1987). The underscored passage in section 525.172 and its operation in the case of her deceased son is what plaintiff has challenged here.

B. WELSA Heirship Provision and the Equal Protection Clause

Under the Due Process Clause of the Fifth Amendment, the federal government must afford every person within its jurisdiction equal protection of the laws. Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693 (1954). The Supreme Court has

repeatedly held that '[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81, 100, 63 S. Ct. 1375 (1943); see also Trimble v. Gordon, 430 U.S. 762, 769-70, 97 S. Ct. 1459, 1465 (1977). Classifications based on illegitimacy are not subject to 'strict scrutiny," however; they 'are invalid . . . if they are not substantially related to permissible state interests." Lalli v. Lalli, 439 U.S. 259, 265, 99 S. Ct. 518, 523 (1978). '[A] classification based on illegitimacy is unconstitutional unless it bears 'an evident and substantial relation to the particular . . . interests this statute is designed to serve.'" United States v. Clark, 445 U.S. 23, 27, 100 S. Ct. 895, 899 (1980) (quoting Lalli v." Lalli, 439 U.S. 259, 268, 99 S. Ct. 518, 524 (1978)). There is no dispute that the provision plaintiff has challenged treats illegitimate children differently from legitimate children; the former are completely barred from inheriting by right of representation through their fathers. The question remains whether that distinction is evidently and substantially related to the interests served by WELSA. The Court will first evaluate the interests advanced by WELSA, then the means by which those purposes are achieved, and finally the relationship between the two.

WELSA is a remedial statute intended to resolve finally and as fairly and equitably as possible present and future disputes over land on the White Earth Reservation. The statute requires the Secretary to determine the heirs of a decedent and to accept the findings of the Minnesota probate courts unless they are challenged within a certain time. The distribution of funds extinguishes any potential claims that the heirs of an allottee might have and clears the title for innocent third parties who presently do or in the future may own the allotments. Defendant analogized WELSA to the New York intestacy statute scrutinized in Lalli v. Lalli, 439 U.S. 259

(1978), noting that the primary goal of the New York statute was the just and orderly disposition of property at death, an interest "directly implicated in paternal inheritance by illegitimate children because of the peculiar problems of proof that are involved" in establishing paternity. Def.'s Mem. in Opp. to Pl.'s Mot. for Summ. J., at the eighth unnumbered page. The Court finds this analogy persuasive.

With respect to the means by which Congress has chosen to achieve a settlement of present and future land disputes, the Court concludes that WELSA operates like an intestacy statute, distributing a sum of money equal to the value of a disputed tract of land to the heirs or beneficiaries of those who held an interest in the allotment. Defendant contends that the 1987 amendment to the statute's definition of "heir," incorporating by reference the ban on illegitimate children inheriting by right of representation through the father, was "designed to establish a uniform set of laws to aid in the implementation of a remedial statute." Def.'s Mem. in Supp. of Summ. J., at 10. As originally enacted, WELSA required the Secretary of the Interior to determine heirship according to the law of the domicile of the decedent at the time of his or her death. The 1987 technical amendment allowed the Secretary to apply the law of one state at one moment in time to all decedents, regardless of the time or place of their death. Defendant argues that the 1987 amendment was designed to expedite distributions under WELSA.

The narrow question before the Court is the relationship between the provision of WELSA under challenge and Congress's objective of assuring accuracy and efficiency in the distribution of money as settlement for claims involving lands on the White Earth Reservation. "Judicial deference is appropriate when the challenged statute involves the 'substantial . . . interest in providing for the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property . . .'" In Trimble, 430 U.S. at

767, 97 S. Ct. at 1463-64 n.12 (quoting Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 170, 92 S. Ct. 1400, 1404 (1972) (internal quotation omitted)); see also Reed v. Campbell, 476 U.S. 852, 855, 106 S. Ct. 234, 2237 (1986). The Supreme Court has noted, in the context of intestacy laws, that '[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate." Trimble, 430 U.S. at 772, 97 S. Ct. at 1466. However, the ability of illegitimate children to receive property down the paternal line clearly raises issues of proof not presented by distributions to either legitimate children or illegitimate children down the maternal line.[12]

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[12] In support of her position, Plaintiff relies heavily upon the Seventh Circuit's opinion in Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975). Eskra involved a woman born out of wedlock who claimed a share of her great-aunt's Indian trust land through her mother. The Department of the Interior's Board of Indian Appeals applied a Wisconsin statute which restricted the right of illegitimate children to inherit. The statute allowed an illegitimate child to inherit directly from his or her mother unconditionally, and from his or her father if the father had acknowledged paternity in a signed and witnessed writing or in open court. Eskra, 524 F.2d at 11 n.4 (quoting Wis. Stat. § 237.06). The statute barred, however, an illegitimate child from inheriting by representation through either the mother or father unless the child had been legitimated by the parents' marriage. Id.

The Seventh Circuit analyzed the case before it in light of Labine v. Vincent, 401 U.S. 532, 91 S. Ct. 1017 (1971), which held that a state may discriminate against an illegitimate when distributing her deceased father's property. The court of appeals in Eskra considered "whether the federal government may discriminate against an illegitimate Indian child when it is distributing intestate property left by a collateral heir of the plaintiff's deceased mother." Eskra, 524 F.2d at 10. The Seventh Circuit reasoned that "the state's interest in certainty is manifestly different in a case involving----the right of an illegitimate to participate in her father's estate than in one in which the right to share in the mother I s estate, or to take through the mother is involved." Id. at 14. Thus, to the extent that the Wisconsin statute barred the appellant from inheriting

The provision at issue here does not operate as a complete statutory ban on the right of illegitimate children to share in the settlement under WELSA. Rather, it occupies a "middle ground" identified by the Supreme Court which lies between complete exclusion and a case-by-case determination of heirship: "For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws." Trimble, 430 U.S. at 771, 97 S. Ct. at 1465. The provision plaintiff has challenged bars an illegitimate child from being deemed an heir by right of representation, although it does allow an illegitimate child to claim directly from his or her father upon production of a signed and witnessed acknowledgement of paternity.

Unlike workers' compensation or other tort-based remedial statutes, see Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 170, 92 S. Ct. 1400, 1404 (1972) and Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509 (1968), or benefits available under the Social Security Act or other federal programs, see Mathews V. Lucas, 427 U.S. 495, 96 S. Ct. 2755 (1976); United States v. Clark, 445 U.S. 23, 100 S. Ct. 895 (1990) (Civil Service Retirement Act), eligibility for

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by representation through her mother, the Seventh Circuit distinguished Labine and held that the Interior Department's application of the Wisconsin statute violated the appellant's rights to Equal Protection under the Fifth Amendment. Id.

Defendant contends that the Seventh Circuit's holding in Eskra is limited to cases involving restrictions on inheritance by representation through the illegitimate child's mother. The Court agrees. Indeed, the Eskra opinion plainly differentiates between inheritance through the mother and inheritance through the father: "[T]he variety of situations in which natural fatherhood might be disputed makes it permissible to treat all cases involving fathers as distinguishable from all cases involving mothers." Id. The Court concludes that Eskra is not squarely dispositive of the issue before this Court, as the plaintiff would assert.

compensation under WELSA is not based upon "a direct blood and dependency relationship with the deceased." Weber, 406 U.S. at 175, 92 S. Ct. at 1406. Potential claimants under WELSA cannot be so readily defined and may exist due to not only blood relationships but also "diffuse questions of affection and affinity." Id. For example, Plaintiff here seeks to claim a share, as the mother of Richard Charles Beaupre, of the distribution to the heirs of the decedent, Richard C. Beaupre.

The obligations of the Due Process Clause require adequate notice to all heirs at law and other parties in interest under WELSA. See 43 C.F.R. § 4.352(b). Granting heirship status to illegitimate children claiming by right of representation through their fathers would impose a burden upon the settlement process which is contrary to the federal government's interest in finality and effective resolution of claims involving lands on the White Earth Reservation. The Court concludes that there is a logical relationship between the federal government's evident and substantial interest in accurately and efficiently settling claims to the disputed lands in Minnesota and the statute's treatment of illegitimate children in determining their heirship status. Accordingly, the challenged provision of WELSA does not violate the equal protection guarantees of the Fifth Amendment of the Constitution.

Conclusion

Based on the foregoing, and all the files, records and proceedings herein, **IT IS ORDERED** that

(1) Defendant's Motion for Summary Judgment (Doc. No. 4) is **GRANTED;**

(2) Plaintiff's Motion for Summary Judgment (Doc. No. 6) is **DENIED;** and

(3) Plaintiff's complaint is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: October 25, 1994.

RICHARD H. KYLE
United States District Judge

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Indian Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

WELSA HEIRSHIP DETERMINATION OF RICHARD C. BEAUPRE	:	Order Affirming Decision
	:	Docket No. IBIA 93-89-W
	:	January 19, 1994

This is an appeal from an April 30, 1993, order determining heirs and an April 30, 1993, order disallowing objections issued by Administrative Judge Sandra L. Massetto in the heirship determination of Richard C. Beaupre (decedent) under the White Earth Reservation Land Settlement Act (WELSA), 25 U.S.C. § 331 note (1988).

Section 9 of WELSA directs the Secretary of the Interior to determine the heirs of certain White Earth Chippewa Indians. Sec. 3(l) provides:

> "Heir" means a person who received or was entitled to receive an allotment or interest as a result of testate or intestate succession under applicable Federal or Minnesota law, or one who is determined under section 9, by the application of the inheritance laws of Minnesota in effect on March 26, 1986 * * *, to be entitled to receive compensation.

Appellant Mabel Shangreau contends that Judge Massetto erred in failing to address the constitutionality of a Minnesota Law applied in this case, i.e., Minn. Stat. § 525.172 (repealed

by Act of May 29, 1985, 1985 Minn. Laws 851). Appellant seeks to avoid application of this provision because, under it, her now-deceased son, Richard Charles Beaupre, was found not to be an heir of decedent.[1]

Before Judge Massetto, appellant contended that Minn. Stat. § 525.172, discriminates against illegitimate children and is therefore unconstitutional. The Judge, citing Estate of Florence Bluesky Vessell, 1 IBIA 312, 79 I.D. 615 (1972), found, that she did not have the authority to declare a state statute unconstitutional. Appellant urges the Board to address her constitutional challenge to the Minnesota Statute. She contends, inter alia, that the Board decision relied upon by Judge Massetto was reversed in Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975).

It is true that the state statute at issue in Vessell was found unconstitutional in Eskra. But the Court of Appeals did not hold that the Board had authority to declare the statute unconstitutional. Indeed, the Federal courts have traditionally recognized that administrative agencies lack such authority. E.g., Johnson v. Robison, 415 U.S. 361, 368 (1974); Oestereich v. Selective Service Board, 393 U.S. 233, 242 (1968); Public Utilities Commission v. United States, 355 U.S. 534, 539 (1958). In a number of decisions subsequent to Vessell, the Board has reaffirmed its holding there--that it lacks the authority to declare a statute unconstitutional. E.g., Reindeer Herders Association v. Juneau Area Director. 23 IBIA 28, 48; 99 I.D. 219, 229 (1992); Redleaf v. Muskogee Area Director, 18 IBIA 268 (1990), and cases cited therein. It is apparent that appellant must make her constitutional challenge in Federal court.

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[1] Minn. Stat. § 525.172 precludes inheritance by an illegitimate child from the kindred of the child's father. Appellant was not married to Charles Roy Beaupre, who was decedent's son and the father of Richard Charles Beaupre. Charles Roy died on Mar. 12, 1976. Decedent died on Aug. 1, 1986.

Appellant argues that, if the Board declines to address her constitutional argument,

> it is incumbent on the Department to fully articulate the interests which are served by relying on Minn. Stat. § 525.172 in the WELSA heirship determination process. Even if the Department maintains its position that it will not rule on the constitutionality of Minn. Stat. § 525.172, it is still possible for the Department to carefully consider and set forth the reasons why it supports WELSA's incorporation of this discriminatory state law, and the justification for this use of birth status discrimination. This would allow the court to more confidently make the constitutional determination the Department refuses to do.

(Appellant's Statement of Reasons at 4-5). In her reply brief, appellant indicates that it is the Board which she expects to "articulate" these matters. See Appellant's Reply Brief at 7-8: "[A]ppellant has requested that the Board articulate the interests that are furthered by use of Minn. Stat. § 525.172 in the WELSA heirship determination process." Clearly, however, if the Board lacks jurisdiction over the constitutionality question, it also lacks jurisdiction to make the findings requested by appellant. In any event, it is not necessary for the Board to venture into an area in which it lacks jurisdiction in order to assist the Federal courts. The Board has no doubt that, should appellant pursue this matter in Federal court, the Federal Government's position as to the constitutionality of the Minnesota statute will be fully articulated to the court.

Appellant made another argument before Judge Massetto. She contended that there were actually two relevant Minnesota laws in effect on March 26, 1986, the date specified

in WELSA, and that the Judge could have chosen to apply the newer statute, which allows illegitimate children to inherit from the kindred of their fathers. Judge Massetto found that the newer provision, Minn. Stat. § 524.2-109, although enacted in 1985, had a delayed effective date--i.e., it was effective only as to decedents dying after December 31, 1986--and was therefore not in effect on March 26, 1986. She further found that the repeal of Minn. Stat. § 525.172 was subject to the same delayed effective date. Appellant does not challenge these findings before the Board.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Massetto's April 30, 1993, orders are affirmed.

s/s
Anita Vogt
Administrative Judge

s/s
Kathryn A. Lynn
Chief Administrative Judge

WELSA Heirship Determination of Richard C. Beaupre
Docket No. IBIA 93-89-W
Order Affirming Decision
Issued January 19, 1994
25 IBIA 133

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IN THE MATTER OF THE WELSA HEIRSHIP DETERMINATION OF	)	No. WC 93-0052
RICHARD C. BEAUPRE	)	FINAL ORDER DETERMINING HEIRS
Deceased.	)	ISSUED: April 30, 1993

The matter of the WELSA heirship determination of the above-named decedent, having been commenced by the Project Director before the Administrative Judge, U.S. Department of the Interior, Office of Hearings & Appeals, Phoenix, Arizona, and having read and considered the data presented by the Project Director and all other evidence included in the record, the Administrative Judge makes the following findings of fact and conclusions of law:

1. This is a proceeding to determine the heirs of the above-named decedent pursuant to the White Earth Land Settlement Act (WELSA) of 1985, Pub. L. 99-264 (100 Stat. 61), as amended by Pub. L. 100-153 (101 Stat. 886), Pub. L. 100-212 (101 Stat. 1433), and Pub. L. 101-301 (104 Stat. 210), at 25 U.S.C Sec. 331 (1887) (note), as amended and regulations of the Department of the Interior, 56 Fed. Reg.

61382 (1991) (to be codified at 43 C.F.R. Sections 4.350-4.357).

2. Decedent died on August 1, 1986 and has been named as an heir of LIZZIE PEMBERTON BEAUPRE BLAIR, a/k/a MO KAH AH MO QUAINCE, WC 91-0009, who has filed claim under Section 4 (a) (2) of the WELSA Act.

3. There is no prior determination of the heirs of the decedent recognized by the WELSA Act.

4. The Notice and Order of Preliminary Determination of Heirs was mailed to each party in interest and was caused to be timely posted by the Project Director at the designated sites listed in paragraph 10 of said notice. All other notices required by law were duly given.

5. The time for submitting objections to the order of Preliminary Determination of Heirs has expired. Objections have been, filed. A Notice To All Parties In Interest of Receipt of Objections and Request For Comments was entered on March 8, 1993. The decedent's family history, the persons named as decedent's heirs and the share of each heir are correctly shown on the Order of Preliminary Determination of Heirs except as otherwise modified and set forth in the attached Notice of Final Order Determining Heirs. Said findings and subsequent modificatIons are incorporated herein.

6. Statement of decedent's family history: Decedent was born April 11, 1912 and died August 1, 1986 at Red Wing, Minnesota. The information submitted by the Bureau of Indian Affairs indicates that decedent was married twice. His first marriage is reported to be to Margaret Rain circa 1940 which ended in divorce circa 1954. Decedent allegedly married Philomene Azure on August 10, 1953. This marriage was still in effect on decedent's date of death.

The Bureau of Indian Affairs is unable to document or confirm the source of the 1954 date of divorce for the decedent and Margaret Rain. Decedent's son, Richard

Charles Beaupre, was unable to provide any information concerning his father's divorce from Margaret Rain. Contact with the LaSalle Convalescent Home, Margaret Rain's place of residence, revealed that under no circumstances would Ms. Rain be capable of personally communicating any such fact.

On January 13, 1993, the decedent's son, Richard C. Beaupre, advised the Office of Hearings and Appeals that, although he is not in possession of a marriage certificate, he was informed by his parents throughout his lifetime that their date of marriage was August 20, 1953. The birth certificates of Richard Charles Beaupre, Francis Clinton Beaupre and Ronald Lee Beaupre identify each of the children's birth as legitimate. Consequently, a discrepancy exists resulting in the second marriage occurring prior to the decedent's divorce from his first spouse.

In view of the above, it is determined that the 1954 date of divorce was not obtained from official records nor was it communicated by any party having knowledge of decedent's personal history. It is commonly accepted by the family members and the community that there was, in fact, a divorce for the decedent and Margaret Rain and a subsequent marriage to Philomene Azure. The Administrative Judge is, therefore, satisfied that the decedent was legally married to Philomene Azure at the time of his death.

The Department of the Interior regulations direct the Administrative Judge to "enter a preliminary determination of heirs based upon inheritance laws in accordance with the Act."_ 56 Fed. Reg. 61382, 61384 (1991) [to be codified as 43 C.F.R. Sec. 4. 3 52 (b)]. The Act is defined in the same regulations as the White Earth Reservation Land Settlement Act of 1985 as amended 56 Fed. Reg. 61382, 61384 (1991) [to be codified as 43 C.F.R. Sec. 4.350 (c)(1)]. The WELSA Act provides in Section 3(1) that an heir will be determined by "application of the inheritance laws of Minnesota in effect on March 26, 1986." Pub. L. 99-264 (100 Stat. 61), as amended

by Pub. L. 100-153 (101 Stat. 886) and Pub. L. 100-212 (101 Stat. 1433). Although inheritance law is not defined in the WELSA Act or in the departmental regulations, the phrase means the distribution of property in accordance with the laws-of intestate succession. See Black's Law Dictionary 783 (6th Ed. 1990); Rivers v. Rivers, 346 S.W. 2d 376, 379 (1961); Lockwood v. Adamson, 566 N.E. 2d 96, 99 (1991).

There are two 1986 Minnesota statutes on intestate succession that control this decision. under Minnesota law, one-third of a decedent's property is distributed to the surviving spouse with the remainder divided "[i]n equal shares to the surviving children and to the issue of deceased children by right of representation." Minn. Stat. Sec. 525.16 (1) and (4)(a) (1971). A child which is born to a mother who was not married to the child's father when the child was conceived nor when the child was born, however, cannot inherit from the father unless there has been a written and witnessed acknowledgment of paternity or there has been a determination of paternity before a court of competent jurisdiction. Minn. Stat. Sec. 525.172 (1971). Minnesota law further provides that even if the technical requirements of Minn. Stat. Sec. 525.172 are met, such child cannot "inherit from the kindred of the father by right of representation." Id. (Federal law on inheritance rights of illegitimate children differs substantially from the Minnesota rule. See Act of Feb. 28, 1891, 26 Stat. 795, 25 U.S.C. Sec. 371. Federal law, however, does not apply in this proceeding because WELSA heirship determinations are not actions for the probate of land arising under 25 U.S.C. Sec. 348.)

Based on the evidence before this tribunal, I conclude that at the time of decedent's death, he was survived by his spouse, Philomene E. Azure Beaupre, and their three children, Richard Charles Beaupre, Francis Clinton Beaupre and Ronald Lee Beaupre. His wife and children, therefore, are named as his

heirs at law in this proceeding. Minn. Stat. Sec. 525.16(1) and (4)(a) (1971).

Decedent was preceded in death by a fourth child, Charles Roy Beaupre, who was born August 12, 1943 and died March 12, 1976. The evidence submitted in this case by the WELSA Project Director suggests that Charles Roy Beaupre had a son, Richard Charles Beaupre who was born on October 22, 1973 to Mable Shangreau. In a statement to the WELSA probate clerk, which was reduced to writing by the clerk, Richard Charles Beaupre, decedent's son, stated that his half-brother, Charles Roy Beaupre, however, was not married to Mable Shangreau but recognized that Charles was the father of Richard Charles Beaupre. The record further establishes that in a telephone conversation between Mable Shangreau and the WELSA probate clerk, Mable Shangreau alleged that she was in possession of paternity papers naming Charles Roy Beaupre as the father of her son. By letter of December 16, 1992, the WELSA Project Office requested Mable Shangreau to furnish copies or the papers for inclusion into the record. As of this date of the preliminary order, the Administrative Judge had not received such documentation.

When the objection to Preliminary Determination of Heirs was submitted, attached to the objections was a paternity affidavit dated November 1, 1973. Included with- the affidavit was the February 3, 1993 order or the Circuit Court Judge, State of South Dakota releasing to Mable Shangreau a copy of the "Paternity Affidavit" which was held in the sealed riles of the South Dakota Department of Heath, Department of Administration, Vital Records. In the signed and properly witnessed "Paternity Affidavit", Charles Roy Beaupre acknowledged that he was the father of Richard Charles. The "Paternity Affidavit" also contained the "Affidavit of Mother" in which Mable Shangreau requested that the name of Charles Roy Beaupre be listed as the father on the birth certificate of Richard Charles and that the child bear the surname of

Beaupre. The authenticated and uncontroverted "Affidavit of Paternity" complies with Minn. Stat. Sec. 525.172 and this tribunal finds that Charles Roy Beaupre was the father of Richard Charles Beaupre.

Consequently, even if Charles Roy Beaupre was the father of Richard Charles Beaupre, at best Richard Charles Beaupre's relationship to Charles Roy Beaupre would be that of illegitimate child. Since Charles Roy Beaupre predeceased his father, RICHARD C. BEAUPRE, Charles Roy Beaupre's share of WELSA compensation, if any, would go only to his children under the legal principle of right of representation. Inasmuch as Minn. Stat. Sec. 525.172 does not permit a child who was not conceived nor born during marriage to inherit from the kindred of the father by right of representation, Richard Charles Beaupre cannot be an heir of RICHARD C. BEAUPRE.

7. Decedent died leaving the following heirs, whose names, relationships. to decedent, birth dates and shares in the WELSA compensation under the Minnesota inheritance laws of intestate succession in effect on March 26, 1986, more particularly Minn. Stat. Sec. 525.16 (1) and (4)(a) (1971), are as follows:

Name	Birthdate	Relationship to decedent	Share
Philomene E. Azure Beaupre (DOD: 02-04-1989)	10-13-1933	spouse	3/9
Richard Charles Beaupre	06-06-1955	son	2/9
Francis Clinton Beaupre	05-26-1957	son	2/9
Ronald Lee Beaupre	01-11-1959	son	2/9

ORDER

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior, by Section 8 (c) of the WELSA Act, at 25 U.S.C. Sec. 331, as amended (note) , and other applicable statutes, as delegated to the Administrative Judge by 56 Fed. Reg. 61382 (1991) (to be codified at 43 C.F.R. Sections 4.350-4.357), IT IS HEREBY ORDERED that the heirs of decedent are determined to be as set forth in paragraph 7 above.

This decision is final for the department within thirty (30) days from the date this final order was mailed unless a-petition for reconsideration is timely filed in accordance with 56 Fed. Reg. 61382, 61385 (1991) [to be codified at 43 C.F.R. Section 4.354] or a notice of appeal is timely filed with the Board of Indian Appeals in accordance with 56 Fed. Reg. 61382, 61385 (1991) [to be codified at 43 C.F.R. Section 4.356].

Done at Phoenix, Arizona.

s/s
Sandra L. Massetto
Administrative Judge

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
2901 North Central Avenue, Suite 960
Phoenix, Arizona 85012

IN THE MATTER OF THE WELSA HEIRSHIP DETERMINATION OF	)	No. WC 93-0052
	)	ORDER DISALLOWING
RICHARD C. BEAUPRE Deceased.	)	OBJECTIONS
	)	ISSUED: April 30, 1993

The time for submitting comments to the Objections to the Order of Preliminary Determination of Heirs dated January 27, 1993 having expired, the Administrative Judge finds that:

1. The Objection to Preliminary Determination of Heirs was timely and properly submitted to the Administrative Judge by Mabel Shangreau. Accompanying the objections was a "Memorandum in Support of Objection by Mabel Shangreau" which was filed by the Southern Minnesota Regional Legal Services, Inc., counsel for objector.

2. Notice to All Parties in Interest of Receipt of objections and Requests for Comments on the objections and memorandum was given on March 8, 1993. No comments were received within the prescribed time period.

3. **Findings of Material Facts.**

On July 17, 1992, this tribunal entered a final order in the heirship determination of LIZZIE PEMBERTON BEAUPRE BLAIR, aka MO KAH AH MO QUAINCE, WC 91-0009 in

which her son, Richard C. Beaupre was named as one of her heirs. since Richard C. Beaupre died after his mother on August 1, 1986 and did not have a departmental or state probate recognized by the White Earth Land Settlement Act of 1985 (WELSA or Act), Pub. L. 99-264 (100 Stat. 61), as amended by Pub. L. 100-153 (101 Stat. 886), Pub. L. 100-212 (101 Stat. 1433), and Pub. L. 101-301 (104 Stat. 210) at 25 U.S.C. Sec. 331 (note), a subsequent heirship determination was needed to identify his heirs.

On January 6, 1993, the WELSA Project Director commenced the heirship determination of Richard C. Beaupre, Docket WC 93-0052.[1] The record submitted in the case contained a "Certificate of Degree of Indian Blood" prepared by the U.S. Department of the Interior, Bureau of Indian Affairs, Red Lake Agency which named Richard C. Beaupre as the father of Charles Roy Beaupre, whose date of birth and date of death were listed respectively as August 8, 1943 and March 12, 1976. The Administrative Judge considered this evidence sufficient proof to find that Charles Roy Beaupre was the son of the decedent and that Charles Roy Beaupre predeceased his father on March 12, 1976.

Also included in the documentation of the case was (1) a telephone contact sheet prepared on September 25, 1993 by the WELSA probate clerk, Carmel Headbird, in which Richard C. Beaupre, Jr. informed the WELSA Project Office that his half-brother, Charles Roy Beaupre, was not married to Mable Shangreau when she gave birth to Richard Charles Beaupre on

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[1] The decedent's full name is Richard Charles Beaupre, Sr. He had four children: Charles Roy Beaupre, Richard Charles Beaupre, Jr.; Francis Clinton Beaupre; and Ronald Lee Beaupre. The name of Charles Roy Beaupre's alleged son is also Richard Charles Beaupre. To minimize the confusion over the names in this case, decedent will be referred to as Richard C. Beaupre; decedent's son will be known as Richard C. Beaupre, Jr.; and Charles Roy Beaupre's alleged son will be identified as Richard Charles Beaupre.

October 22, 1973; (2) a telephone contact sheet prepared on January 11, 1993 by Carol Wold, paralegal for the Administrative Judge, which memorialized a telephone conversation with Carmel Headbird and noted that the probate clerk had spoken to Mable Shangreau who confirmed that she was never married to Charles Roy Beaupre; and, (3) the death certificate of Richard Charles Beaupre which listed his date of death as March 1, 1992 and identified Charles Roy Beaupre as his father and Mable Shangreau as his mother. Based on the evidence in the record, this Administrative Judge determined that Mable Shangreau was the mother of Richard Charles Beaupre and at the time of his conception and birth she was not married to Charles Roy Beaupre.

The record also contained a letter dated December 16, 1992 from Marvlyn Hyde, Realty Officer, U. S. Department of the Interior, Bureau of Indian Affairs, Minnesota Agency to Mable Shangreau in which Ms. Hyde mentioned that Ms. Shangreau had paternity papers on her son, Richard Charles Beaupre. The paternity papers, however, were not included in the record received from the WELSA Project Director nor did the Administrative Judge request copies of the documents before the order of Preliminary Determination of Heirs was issued. When the Objection to Preliminary Determination of Heirs was submitted, attached to the objections was a paternity affidavit dated November 1, 1973. Included with the affidavit was the February 3, 1993 order of the Circuit Court Judge, State of South Dakota releasing to Mable Shangreau a copy of the "Paternity Affidavit" which was held in the sealed files of the South Dakota Department of Heath, Department of Administration, Vital Records. In the signed and properly witnessed "Paternity Affidavit", Charles Roy Beaupre acknowledged that he was the father of Richard Charles. The "Paternity Affidavit" also contained the "Affidavit of Mother" in which Mable Shangreau requested that the name of Charles Roy Beaupre be listed as the father on the birth certificate of

Richard Charles and that the child bear the surname of Beaupre.

The authenticated and uncontroverted "Affidavit of Paternity" complies with Minn. Stat. Sec. 525.172 and this tribunal finds that Charles Roy Beaupre was the father of Richard Charles Beaupre. The Administrative Judge, however, did not consider it necessary to make such a finding in the Order of Preliminary Determination of Heirs issued January 27, 1993 and stated:

> Consequently, even if Charles Roy Beaupre was the father of Richard Charles Beaupre, a finding which this tribunal does not make, at best Richard Charles Beaupre's relationship to Charles Roy Beaupre would be that of illegitimate child. Since Charles Roy Beaupre predeceased his father, RICHARD C. BEAUPRE, Charles Roy Beaupre's share of WELSA compensation, if any, would only go to his children under the legal principle of right of representation. Inasmuch as Minn. Stat. Sec. 525.172 does not permit a child who was not conceived nor born during marriage to inherit from the kindred of the father by right of representation, Richard Charles Beaupre cannot be an heir of **Richard C. Beaupre**.

(order of Preliminary Determination of Heirs at 4.) The undersigned reached this conclusion by applying Minn. Stat. Sec. 525.16(1) and (4) (a) on the descent of property and Minn. Stat. Sec. 525.172 dealing with certain children as heirs which statutes were in effect in Minnesota on March 26, 1986.

4. Conclusions of Law.

Objector asks this tribunal to modify its Order of Preliminary Determination of Heirs "to allow objector's son to be an heir by right of representation." (Objector's Memorandum at 7.) Objector asserts that Minn. Stat. Sec. 525.172, which precludes certain children from inheriting by right of representation, "discriminates based solely on birth status even where paternity is properly acknowledged and recorded." Id. at 2. Objector concludes that:

> . . . the Department's Order in this case violates the Equal Protection Clause by its reliance on Minn. Stat. Sec. 525.172 to determine that objector's cannot inherit from the decedent, his grandfather, by right of representation.

Id. at 7. objector, however, suggests that this constitutional infirmity can be avoided if section 3(l) of WELSA is interpreted to mean that Minn. Stat. Sec. 524.2-109(2) regarding the marital status of parents and Minn. Stat. Sec. 524.2-106(l) on representation must be applied by the Administrative Judge instead of Minn Stat. Sec. 525.172. For the reasons discussed below, the objections of Mable Shangreau are denied.

a. The Administrative Judge does not have authority to declare a state statute unconstitutional.

Objector's contentions are, in essence, a challenge to the constitutionality of the last clause of Minn. Stat. Sec. 525.172:

> A child born to a mother who was not married to the child's father when the child

> was conceived nor when the child was born shall inherit from the mother the same as if the child was conceived or born to her while she was married, and also from the person who in writing and before a competent witness shall have declared himself to be the child's father, provided such writing or an authenticated copy thereof shall be produced in the proceeding in which it is asserted or from the person who has been determined to be the father of such child in a paternity proceeding before a court of competent jurisdiction; **but such child shall not inherit from the kindred of the father by right of representation**. (Emphasis added.)

Objector cites Supreme Court and federal court cases to support her contention that there is no legitimate federal, state or tribal interest in applying an inheritance law which discriminates on the bases of birth status. Although this tribunal seriously questions[2] the enforceability of the challenged portion of the Minn. Stat. Sec. 525.172, the Administrative Judge does not have authority to declare a

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[2] The Minnesota Supreme Court in upholding the acknowledgement requirements of Minn. Stat. Sec. 525.172 commented in dicta:

> while a similar restriction in our statute relating to the inheritance of illegitimates by right of representation might, in a proper case, be subject to the same constitutional infirmities found by the North Dakota court, that problem is not before us.

In re Estate of Pakarinen, 287 Minn. 330, 337, 178 N.W. 2d 714, 717 (1970) appeal dismissed sub. nom. Hietala v. Heir of Pakarinen, 402 U.S. 903, 91 S.Ct. 1384, 28 L.Ed.2d 644 (1971).

state statute, or any portion thereof, unconstitutional. Estate of Florence Bluesky Vessell, 1 IBIA 312, 318 (1972). Accordingly, the undersigned is precluded from considering this argument.

b. The Administrative Judge properly applied Minn. Stat. Sec. 525.172 in the heirship determination of Richard C. Beaupre.

Objector acknowledges in her memorandum that section 3(l) of WELSA requires "the inheritance laws of Minnesota in effect on March 26, 1986" be applied in rendering WELSA heirship determinations. (Objector's Memorandum at 3). Objector urges this tribunal to adopt an interpretation of the phrase "in effect on March 26, 1986" to mean:

> . . .as of 26 March 1986, there were two different laws in Minnesota concerning intestate succession. Minn. Stat. Sec. 525.172, with its discrimination based on birth status, was in effect vis-a-vis estates of persons dying on or before 31 December 1986; and Minn. Stat. Sec. 524.2-109(2), without birth status discrimination, was also in effect, vis-a-vis the estates of person dying after 31 December 1986.
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> . . .
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> The language of WELSA appears broad enough to allow the Department to use the law, in effect on 26 March 1986, which does not discriminate based on birth status.

Id. at 4-5). Although objector cites no authority to support her analysis of section 3(l), this tribunal recognizes the well-established rule of statutory construction that if one of alternative interpretations would create constitutional problems, a court should construe the statute to avoid these difficulties. American Federation of Labor, Etc. v. Kahn 618 F. 2d 784, 799 (CADC 1979). While Objector's interpretation of section 3(l) of WELSA clearly would remove the infirmities of which she complains, the undersigned rejects this strained construction of the Act because it is based on the erroneous contention that Minn. Stat. Sec. 525.172 and Minn. Stat. Sec. 524.2-109(2) were both "in effect on March 26, 1986." (Emphasis added.)

In order to resolve Objector's arguments, the Administrative Judge is required to review Minnesota inheritance laws. In most cases the responsibility of an Administrative Judge would be to interpret and apply federal law, not State law. However, since Congress incorporated the state laws on inheritance into section 3(l) of WELSA, this tribunal has authority to make determinations concerning State law.

In 1985, the State of Minnesota made major revisions to the state inheritance laws which affect the decision in this case. 1985 Laws of Minn., ch. 250, pp. 851-861. Reading chapter 250 in its entirety, it is clear that both Minn. Stat. Sec. 526.172 and Minn. Stat. Sec. 524.2-109(2) were not in effect on March 26, 1986 as objector maintains. Although chapter 250 has an approval date [date of enactment] of May 29, 1985, section 28 specifically delayed the effective date of section 9 [codified as Minn. Stat. Sec. 524,2-109(2)] until January 1, 1987:

> [s]ections 1 to 25 and 27 are effective for estates of decedents dying after December 31, 1986.

Id. at 861.[3] The Minnesota Legislature further provided that Minn. Stat. Sec. 526.172 remain in effect until December 31, 1987 when the statute was repealed by the unambiguous language of section 20, Id. Accordingly, this tribunal concludes that although Minn. Stat. Sec. 524.2-109(2) was enacted on May 29, 1985, it was not effective on March 26, 1986 as required by section 3(l) of WELSA and that the undersigned properly applied Minn. Stat. Sec. 526.172 to this heirship determination.

The Department of the Interior (Interior) has consistently recognized that the revisions made to the Minnesota inheritance laws in 1985 Laws of Minn., chapter 250 were not effective on March 26, 1986. On November 5, 1990, Interior promulgated rules and regulations to implement the provisions of the Act dealing with heirship determinations and proceedings before interior's Office of Hearings and Appeals. 55 Fed. Reg. 46530 (1990) (to be codified at 43 C.F.R. Secs. 4.350-4.357) (proposed November 5, 1990).[4] After extensive

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[3] The Laws of Minnesota specify when an enacted law becomes effective. Minn. Stat. Sec. 624.02 entitled "[e]ffective date and time of laws," provides in pertinent part, that:

> Each act, except one making appropriations, enacted finally at any session of the legislature takes effect on August 1, next following its final enactment, unless a different date is specified in the act. (Emphasis added.)

For a further discussion of the effective dates of statutes see generally 2 Sutherland Stat. Const., Secs. 33.02 and 33.07 (1986).

[4] When Congress enacted WELSA it created a comprehensive scheme for investigation and payment of WELSA claims to White Earth allottees and their heirs under the exclusive jurisdiction of the Secretary of the Interior (Secretary). In Section 8(c) of WELSA, Congress also directed the Secretary to make such heirship determinations as may be necessary to provide the allottees or their heirs with written notice of the

comment period, final rules were published in the Federal Register on December 3, 1991 and became effective on January 2, 1992. 56 Fed. Reg. 61382 (to be codified at 43 C.F.R. Secs. 4.350-4.357). The explicit statements expressed in the "supplemental information" section to the final rule makes clear that Interior did not consider the Minnesota intestate succession laws enacted in 1985 effective on March 26, 1986:

> Specific references in the regulations to the inheritance laws of Minnesota in effect on March 26, 1986, were deleted. WELSA presently provides that these laws will be applied in making heirship determinations. Prior to March 26, 1986, the Uniform Probate Code was adopted in Minnesota, but the amendment of Minnesota law was not effective until after March 26, 1986. . . The Department is currently considering seeking a technical amendment that would allow the application of new State laws of intestate succession. By not specifically stating the date of the law to be applied in the regulation, WELSA could be amended without the necessity of making a corresponding amendment to the

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compensation due them. In order to expedite the federally administrated heirship proceedings, Congress required the Secretary under Section 9 of the Act to accept prior determinations of heirship recognized by section 5(a) of the Act or, if none existed, to identify the heirs by applying the inheritance laws of Minnesota (the state where the disputed allotments are located). Congress selected the Minnesota inheritance laws in effect on March 26, 1986 (the date of the enactment of the Act) so that uniform laws on inheritance would be applied to every decedent subject to the Act regardless of the individual's date or place of death and regardless of whether the individual was Indian or a non-Indian.

> regulations. The statutory date will be followed in determining the law to be applied. (Emphasis added.)

Id. at 61382. Although Interior stated in the rule comments that the 1985 Minnesota laws was 'more lenient than prior Minnesota law in such areas as inheritance by adopted and illegitimate children," the requisite amendments to WELSA have never been made. Id.

Since the effective date of the rules and regulations the undersigned has applied Minn. Stat. Sec. 525.172 in all cases involving questions of illegitimate children. The application of Minn. Sec. 525.172 is clearly within the preview of section 3(l) of WELSA. Consequently, this tribunal reaffirms its original decision set forth in the Order of Preliminary Determination of Heirs issued on January 27, 1993 that since Minn. Stat. Sec. 525.172 does not permit a child who was not conceived nor born during marriage to inherit from the kindred of the father by right of representation, Richard Charles Beaupre cannot be an heir of his grandfather, RICHARD C. BEAUPRE.

5. Request for hearing.

Objector has requested a hearing on this matter. In paragraph 5 of her objections she states:

> . . .that the Administrative Law Judge seek testimony and evidence on discrimination based on birht (sic) status in WELSA heirship determinations.

The undersigned concludes that since such evidence would not assist in the resolution of the above legal issues, request is

denied. Id. at 61385 (to be codified at 43 C.F.R. Sec. 4.352(c)).

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior, by Section 8(c) of the WELSA Act, 25 U.S.C. Sec. 331, note WELSA, and other applicable statutes, as delegated to the Administrative Judge by 56 Fed. Reg. 61382 (1991) (to be codified at 43 C.F.R. Secs. 4.350-4.357), IT IS HEREBY ORDERED that:

1. The undersigned does not have authority to declare Minn. Stat. 525.172 unconstitutional;

2. The undersigned properly applied Minn. Stat. Sec. 525.172 in the above captioned heirship determination.

4. Request for hearing is denied; and,

3. Mable Shangreau's objections are disallowed and the Order of Preliminary Determination of Heirs dated January 27, 1993 is in all respects factual and correct except that said order is modified to include the finding that Charles Roy Beaupre was the father of Richard Beaupre.

s/s
Sandra L. Massetto
Administrative Judge

WHITE EARTH LAND SETTLEMENT ACT OF 1985

White Earth Reservation Land Settlement

Pub.L. 99-264, Mar. 24, 1986, 100 Stat. 61, as amended Pub.L. 100-153, § 6(a), (b), Nov. 5, 1987, 101 Stat. 887; Pub.L. 100-212, § 4, Dec. 24, 1987, 101 Stat. 1443; Pub.L. 101-103, § 8, May 24, 1990, 104 Stat. 210, provided:

'That this Act may be cited as the 'White Earth Reservation Land Settlement Act of 1985'.

"Sec. 2. The Congress finds that -

'(1) claims on behalf of Indian allottees or heirs and the White Earth Band involving substantial amounts of land within the White Earth Indian Reservation in Minnesota are the subject of existing and potential lawsuits involving many and diverse interests in Minnesota, and are creating great hardship and uncertainty for government, Indian communities, and non-Indian communities;

'(2) the lawsuits and uncertainty will result in great expense and expenditure of time, and could have a profound negative impact on the social and well-being of everyone on the reservation;

'(3) the White Earth Band of Chippewa Indians, State of Minnesota, along with its political subdivisions, and other interested parties have made diligent efforts to fashion a settlement to these claims, and the Federal Government, by providing the assistance specified in this Act, will make possible the implementation of a permanent settlement with regard to these claims;

'(4) past United States laws and policies have contributed to the uncertainty surrounding the claims;

'(5) it is in the long-term interest of the United States, State of Minnesota, White Earth Band, Indians, and non-Indians for the United States to assist in the implementation of a fair and equitable settlement of these claims; and

'(6) this Act will settle unresolved legal uncertainties relating to these claims.

"Sec. 3. For purposes of this Act:

'(a) 'Allotment' shall mean an allocation of land on the White Earth Reservation, Minnesota, granted, pursuant to the Act of January 14, 1889 (25 Stat. 642), and the Act of February 8, 1887 (24 Stat. 388) [see Short Title note above], to a Chippewa Indian.

"(b) 'Allottee' shall mean the recipient of an allotment.

'(c) 'Full blood' shall mean a Chippewa Indian of the White Earth Reservation, Minnesota, who was designated as a full blood Indian on the roll approved by the United States District Court for the District of Minnesota on October 1, 1920, or who was so designated by a decree of a Federal court of competent jurisdiction; it shall also refer to an individual who is not designated on said roll but who is the biological child of two full blood parents so designated on the roll or of one full blood parent so designated on the roll and one parent who was an Indian enrolled in any other federally recognized Indian tribe, band, or community.

'(d) 'Inherited' shall mean received as a result of testate or intestate succession or any combination of testate or intestate succession, which succession shall be determined by the Secretary of the Interior or his authorized representative.

'(e) 'Mixed blood' shall mean a Chippewa Indian of the White Earth Reservation, Minnesota, who was designated as a mixed blood Indian on the roll approved by the United States

District Court of Minnesota on October 1, 1920, unless designated a full blood by decree of a Federal court of competent jurisdiction; it shall also refer to any descendants of an individual who was listed on said roll providing the descendant was not a full blood under the definition in subsection (c) of this section. The term 'mixed blood' shall not include an Indian enrolled in any federally recognized Indian tribe, band, or community other than the White Earth Band.

'(f) 'Tax forfeited' shall mean an allotment which, pursuant to State law, was declared forfeited for nonpayment of real property taxes and purportedly transferred directly to the State of Minnesota or to private parties or governmental entities.

'(g) 'Majority' shall mean the age of twenty-one years or older.

'(h) 'Secretary' shall mean the Secretary of the Interior or his/or her authorized representative.

'(i) 'Trust period' shall mean the period during which the United States held an allotment in trust for the allottee or the allottee's heirs. For the purpose of this Act, the Executive Order Numbered 4642 of May 5, 1927, Executive Order Numbered 5768 of December 10, 1931, and Executive Order Numbered 5953 of November 23, 1932, shall be deemed to have extended trust periods on all allotments or interests therein the trust periods for which would otherwise have expired in 1927, 1932, or 1933, notwithstanding the issuance of any fee patents for which there were no applications, and if such allotments were not specifically exempted from the Executive orders; and the Indian Reorganization Act of June 18, 1934 [see Short Title note set out under section 461], shall be deemed to have extended indefinitely trust periods for which would otherwise have expired on June 18, 1934, or at any time thereafter. Said Executive orders and Act shall be

deemed not to have extended the trust period for allotments or interests which were sold or mortgaged by adult mixed bloods, by non-Indians, or with the approval of the Secretary, or for allotments or interests which were sold or mortgaged by anyone where such sale or mortgage was the subject of litigation in Federal court which proceeded to a judgment on the merits and where the outcome of such litigation did not vacate or void said sale or mortgage.

'(j) 'Interest', except where such item is used in conjunction with 'compound', shall mean a fractional holding, less that the whole, held in an allotment.

'(k) 'Adult' shall mean having attained the age of majority.

'(l) 'Heir' means a person who received or was entitled to receive an allotment or interest as a result of testate or intestate succession under applicable Federal or Minnesota law, or one who is determined under section 9, by the application of the inheritance laws of Minnesota in effect on March 26, 1986 (not including laws relating to spousal allowance and maintenance payments), to be entitled to receive compensation payable under section 8.

'(m) 'Transfer' includes but is not limited to any voluntary or involuntary sale, mortgage, tax forfeiture or conveyance pursuant to State law; any transaction the purpose of which was to effect a sale, mortgage, tax forfeiture or conveyance pursuant to State law; any Act, event, or circumstance that resulted in a change of title to, possession of, dominion over, or control of an allotment or interest therein.

'Sec. 4. (a) The provisions of this Act shall apply to the following allotments:

'(1) allotments which were never sold or mortgaged by the allottees or by their heirs and which were tax forfeited during the trust period;

'(2) allotments which were sold or mortgaged during the trust period, without the approval of the Secretary, by the allottees prior to having attained majority, and were never again sold or mortgaged either by the allottees upon their having attained majority or by heirs of the allottees;

'(3) allotments which were sold or mortgaged during the trust period by full blood allottees without the approval of the Secretary, and were never again the subject of a sale or mortgage by heirs of the allottees; and

'(4) allotments which were never sold or mortgaged by the allottees, but which subsequent to the deaths of the allottees, purportedly were sold or mortgaged, during the trust period, by administrators, executors, or representatives operating under authority from State courts, and were never again the subject of a sale or mortgage by heirs of the allottees.

'(b) The provisions of this Act shall also apply to the following allotments or interests in allotments:

'(1) allotments or interests which were inherited by full or mixed bloods who never sold or mortgaged their allotments or interests or by Indians enrolled in other federally recognized Indian tribes, bands, or communities who never sold or mortgaged their allotments or interests, where the allotments or interests were tax forfeited during the trust period;

'(2) allotments or interests which were inherited by mixed bloods under the age of majority and which were sold or mortgaged during the trust period without the approval of the Secretary prior to such mixed bloods having attained majority, but which were never again sold

or mortgaged by them upon having attained majority or by their heirs;

'(3) allotments or interests which were inherited by full bloods or by Indians enrolled in other federally recognized Indian tribes, bands, or communities, who sold or mortgaged such allotments or interests during the trust period without the approval of the Secretary;

'(4) allotments or interests which were inherited by full or mixed bloods who never sold or mortgaged their allotments or interests, but which, subsequent to the deaths of such heirs, were sold or mortgaged during the trust period by administrators, operating under authority from State courts;

'(5) allotments or interests which were owned by allottees or which were inherited by full or mixed bloods for whom guardians were appointed by State courts, which guardians sold or mortgaged the allotments or interests during the trust period without the approval of the Secretary;

'(6) interests which were inherited by full or mixed bloods who never sold or mortgaged their interests during the trust period, even though other interests in the same allotment were sold by other heirs where the land comprising the allotment has been claimed in full by other parties adversely to the full or mixed bloods who never sold or mortgaged their interests; and

'(7) allotments or interests which were inherited by full or mixed bloods or by Indians enrolled in other federally recognized Indian tribes, bands, or communities which were never sold or mortgaged during the trust period but which were purportedly distributed by State court probate proceedings to other individuals.

"(c) This Act shall not apply to -

'(1) any allotment or interest the sale or mortgage of which was the subject of litigation which proceeded to a judgment on the merits in Federal courts and where the outcome of such litigation was other than vacating and voiding such sale or mortgage;

'(2) any allotment or interest which was tax forfeited subsequent to the date on which the tax exemption was declared by a Federal court to have expired;

'(3) any allotment or interest which was sold, mortgaged, or tax forfeited after the expiration of the trust period; or

'(4) any allotment or interest which was sold or mortgaged at any time by an adult mixed blood Indian.

Nothing in this Act is intended to question the validity of the transactions relating to allotments or interests as described in section 4(c), and such allotments and interests are declared to be outside the scope of this Act.

'Sec. 5. (a) Any determination of the heirs of any person holding an allotment or interest, made by the courts of the State of Minnesota, which is filed with the proper county recording officer prior to May 9, 1979, shall be deemed to have effectively transferred the title of the decedent in the allotment or interest to the heirs so determined unless a separate determination of heirs has been made by the Secretary before the effective date of this Act [Mar. 24, 1986] and such determination has been filed with the proper county recording officer within six months after the effective date of this Act. Nothing in this subsection shall be construed to remove any allotment described in section 4 from the compensation provided for in the Act.

'(b) The 'proper county recording officer', as that term is used in subsection (a) of this section, shall be a county

recorder, registrar of titles, or probate court in Becker, Clearwater, or Mahnomen Counties, Minnesota.

'(c) As to any allotment which was granted to an allottee who had died prior to the selection date of the allotment, the granting of such allotment is hereby ratified and confirmed, and shall be of the same effect as if the allotment had been selected by the allottee before the allottee's death: *Provided*, That the White Earth Band of Chippewa Indians shall be compensated for such allotments in the manner provided in sections 6, 7, and 8.

'(d) As to any allotment that was made under the provisions of the Treaty of March 19, 1867 (16 Stat. 719), and which was reallotted under the provisions of the Act of January 14, 1889 (25 Stat. 642), such reallotment is hereby ratified and confirmed.

'Sec. 6. (a) As soon as the conditions set forth in section 10 of this Act have been met, the Secretary shall publish a certification in the Federal Register that such conditions have been met. After such publication, any allotment or interest which the Secretary, in accordance with this Act, determines falls within the provisions of section 4(a), 4(b), or 5(c), the tax forfeiture, sale, mortgage, or other transfer, as described therein, shall be deemed to have been made in accordance with the Constitution and all laws of the United States specifically applicable to transfers of allotments or interests held by the United States in trust for Indians, and Congress hereby does approve and ratify any such transfer effective as of the date of said transfer, subject to the provisions of section 6(c). Compensation for loss of allotments or interests resulting from this approval and ratification shall be determined and processed according to the provisions of section 8.

'(b) By virtue of the approval and ratification of transfers of allotments or interests therein effected by this section, all

claims against the United States, the State of Minnesota or any subdivisions thereof, or any other person or entity, by the White Earth Band, its members, or by any other Indian tribe or Indian, or any successors in interest thereof, arising out of, and at the time of or subsequent to, the transfers described in section 4(a), 4(b), or 5(c) and based on any interest in or nontreaty rights involving such allotments or interests therein, shall be deemed never to have existed as of the date of the transfer, subject to the provisions of this Act.

"(c) Notwithstanding any provision of law other than the provisions of this section, any action in any court to recover title or damages relating to transactions described in section 4(a), 4(b), 5(a) or 5(c), shall be forever barred unless the complaint is filed not later than one hundred and eighty days following enactment of this Act [Mar. 24, 1986], or prior to the publication required by section 6(a) whichever occurs later in time: *Provided*, That immediately upon the date of enactment of this Act any such action on behalf of the White Earth Band of Chippewa Indians shall be forever barred, unless the publication required by section 6(a) does not take place within two years of the date of enactment of this Act in which case the bar of any such action on behalf of the White Earth Band of Chippewa Indians shall be deemed lifted and nullified: *Provided further*, That the Secretary shall not issue to the White Earth Band any report rejecting litigation nor submit to Congress any legislation report pursuant to section 2415 of title 28, United States Code, relating to transactions described in section 4(a), 4(b), 5(a) or 5(c) of this Act, until and unless the bar against actions on behalf of the White Earth Band is lifted and nullified. Any such action filed within the time period allowed by this subsection shall not be barred; however, the filing of any such action by an allottee, heir, or others entitled to compensation under this Act shall bar such allottee, heir, or others from receiving compensation pursuant

to the provisions of section 8. The United States District Court for the District of Minnesota shall have exclusive jurisdiction over any such action otherwise properly filed within the time allowed by this subsection.

'(d) This section shall not bar an heir, allottee, or any other person entitled to compensation under this Act from maintaining an action, based on the transactions described in section 4(a), 4(b), 5(a), or 5(c), against the United States in the Court of Federal Claims pursuant to the Tucker Act, section 1491 of title 28, United States Code, challenging the constitutional adequacy of the compensation provisions of section 8(a) as they apply to a particular allotment or interest: *Provided*, That such action shall be filed with the Court of Federal Claims not later than one hundred and eighty days after the issuance of the notice of Secretary's compensation determination as provided in section 8(c). If such an action is not filed within the one-hundred-and-eighty-day period, it shall be forever barred. The United States hereby waives any sovereign immunity defense it may have to such an action but does not waive any other defenses it may have to such action. The filing of an action by any heir, allottee, or any other person under the provisions of this section shall bar such person forever from receiving compensation pursuant to the provisions of section 8.

'Sec. 7. (a) The Secretary is hereby authorized to and shall diligently investigate to the maximum extent practicable all White Earth allotments and shall determine which allotments or interest shall fall within any of the provisions of section 4(a), 4(b), or 5(c). As to all such allotments or interests determined to be within the provisions of section 4(a), 4(b), or 5(c), the Secretary shall prepare lists of such allotments or interests, which shall include allotment number, land description, and allottee's name, in English and Ojibway

where available. A first list shall be published within one hundred and eighty days after the date of enactment of this Act [Mar. 24, 1986] in the Federal Register; in a newspaper of general circulation in Mahnomen County, Minnesota; in a newspaper of general circulation in Becker County, Minnesota; in a newspaper of general circulation in Clearwater County, Minnesota; in one newspaper of general circulation in metropolitan Minneapolis-Saint Paul; and, in the Secretary's discretion, in any appropriate band or tribal newspaper. Publication shall take place no later than thirty days after publication in the Federal Register.

'(b) Any tribe, band, or group of Indians, or any individual shall have one year after the date of publication in the Federal Register to submit to the Secretary any additional allotments or interests which the tribe, band, group, or individual believes should fall within any of the provisions of section 4(a), 4(b), or 5(c). The Secretary, without such submissions, may also independently determine that additional allotments or interests fall within such provisions. Any additional allotments or interests submitted to the Secretary shall be accompanied by a statement identifying the allotment or interest and its land description and summarizing the reasons why it should be added to the list required by this section.

'(c) The Secretary shall determine which additional allotments or interests fall within the provisions of section 4(a), 4(b), or 5(c), and not later than March 12, 1989, the Secretary shall publish a second list in the Federal Register and previously required newspapers of the allotments or interests the Secretary has determined should be corrected or added to the first published list.

'(d) Any determination made by the Secretary under this section to include an allotment or interest on the first list required by the section to be published in the Federal Register

may be judicially reviewed pursuant to the Administrative Procedure Act [5 U.S.C. 701 et seq.] not later than ninety days of the publication date of the first list of the Federal Register. Any such action not filed within such ninety-day period shall be forever barred. Any determination made by the Secretary to include an allotment or interest on the second list required by this action to be published in the Federal Register, or any determination made by the Secretary not to include an allotment or interest on such list, may be judicially reviewed pursuant to the Administrative Procedure Act within ninety days of the publication date of the second list in the Federal Register. Any such action not filed within such ninety-day period shall be forever barred. Exclusive jurisdiction over actions under this subdivision is hereby vested in the United States District Court for the District of Minnesota.

'(e)(1) After publication of the second list under subsection (c), the Secretary may, at any time, add allotments or interests to that second list if the Secretary determines that the additional allotment or interest falls within the provisions of section 5(c) or subsection (a) or (b) of section 4.

'(2) The Secretary shall publish in the Federal Register notice of any additions made under paragraph (1) to the second list published under subsection (c).

'(3) Any determination made by the Secretary to add an allotment or interest under paragraph (1) to the second list published under subsection (c) may be judicially reviewed in accordance with chapter 7 of title 5, United States Code, within 90 days after the date on which notice of such determination is published in the Federal Register under paragraph (2). Any legal action challenging such a determination that is not filed within such 90-day period shall be forever barred. Exclusive jurisdiction over any legal action challenging such a determination is vested in the United States District Court for the District of Minnesota.

'Sec. 8. (a) Compensation for a loss of an allotment or interest shall be the fair market value of the land interest therein as of the date of tax forfeiture, sale, allotment, mortgage, or other transfer described in section 4(a), 4(b), or 5(c), less any compensation actually received, plus interest compounded annually at 5 per centum from the date of said loss of an allotment or interest until the date of enactment of this Act [Mar. 24, 1986], and at the general rate of interest earned by United States Department of the Interior funds thereafter. A determination of compensation actually received shall be supported by Federal, State, or local public documents filed contemporaneously with the transaction or by clear and convincing evidence. Compensation actually received shall not be subtracted from the fair market value in any instance where an allotment or interest was sold or mortgaged by a full or mixed blood, under the age of eighteen years, or in any instance where there is prima facie evidence that fraud occurred in a sale or mortgage. No compensation for loss of an allotment or interest relating to transfers described in section 4(b) shall be granted to any person or the heirs of such person where such allotment or interest was received pursuant to State court probate proceedings and where also it has been or is determined by the Secretary that such person or heirs were not entitled to inherit the allotment or interest.

'(b) For the purpose of this section, the date of transfer applicable to interests described in section 4(b)(6) shall be the last date on which any interest in the subject allotment was transferred by document of record by any other heir of the allottee; and the date of transfer applicable to allotments described in section 5(c) shall be the selection date. For purposes of this section, the Secretary shall establish the fair market value of various types of land for various years, which shall govern the compensation payable under this section

unless a claimant demonstrates that a particular allotment or interest had a value materially different from the value established by the Secretary.

'(c) The Secretary shall provide written notice of the Secretary's compensation determination to the allottees or heirs entitled thereto. Such notice shall describe the basis for the Secretary's determination, the applicable time limits for judicial review of the determination, and the process whereby such compensation will be distributed. The Secretary shall proceed to make such heirship determinations as may be necessary to provide the notice required by this section: *Provided*, That the Secretary shall accept as conclusive evidence of heirship any determination of the courts of the State of Minnesota as provided in section 5(a) of this Act: *Provided further*, That the Secretary shall give written notice only to those allottees or heirs whose addresses can be ascertained by reasonable and diligent efforts; otherwise such notice shall be given by publication in the Federal Register.

'(d) The Secretary's administrative determination of the appropriate amount of compensation computed pursuant to the provisions of this Act may be judicially reviewed pursuant to the Administrative Procedure Act [5 U.S.C. 701 et seq.] not later than one hundred and eighty days after the issuance of notice as aforesaid; after such time the Secretary's determination shall be conclusive and all judicial review shall be barred. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the District of Minnesota.

'(e) Once a compensation determination has become conclusive according to the provisions of subsection (d), the Secretary shall certify such determination to the Secretary of the Treasury and such conclusive determination shall be treated as a final judgment, award or, compromise settlement under the provisions of title 31, United States Code, section

1304. The Secretary of the Treasury is authorized and directed to pay out of the funds in the Treasury into a separate interest bearing White Earth Settlement Fund account the amount certified by the Secretary of the Interior in each case. The Secretary of the Interior shall than make a diligent effort to locate each allottee or heir; however, if, after two years from the date on which a determination becomes conclusive an allottee or heir cannot be located, the Secretary of the Interior shall declare the amount owing to such allottee or heir forfeited.

'(f) Any and all amounts forfeited pursuant to subsection (e) together with the interest accumulated thereon, pursuant to section 8 shall be transferred annually to the fund established under section 12 for the White Earth Band.

'Sec. 9. The Secretary shall determine the heirs, if heretofore undetermined, or modify the inventory of an existing heirship determination of any full or mixed blood or Indian enrolled in any other federally recognized Indian tribe, band, or community, where appropriate for the purposes of this Act: *Provided*, That the Secretary shall accept any determination of heirship by the courts of the State of Minnesota as provided in section 5(a) of this Act.

'Sec. 10. (a) The provisions of section 6 of this Act shall take effect upon the publication in the Federal Register by the Secretary of certification that the following conditions have been satisfied:

'(1) The State of Minnesota, in accordance with Laws of Minnesota 1984, chapter 539, has entered into an agreement with the Secretary providing for the transfer of ten thousand acres of land within the exterior boundaries of the White Earth Reservation to the United States to hold in trust for the White Earth Band of

Chippewa Indians as the State's contribution to the settlement provided for by this Act. The Secretary shall not enter into such an agreement until the Secretary determines, or the authorized governing body of the band certifies to the Secretary in writing, that the agreement will result in the transfer of ten thousand acres which possess reasonable value for the White Earth Band, including but not limited to the value for agricultural, recreational, forestry, commercial, residential, industrial, or general land consolidation purposes. The land transferred pursuant to this subsection shall be accepted by the United States subject to all existing accesses, roads, easements, rights of way, or similar uses unless the Governor and Attorney General of the State of Minnesota certify in writing to the Secretary the State's intent to abandon such uses on a particular parcel.

'(2) The State, in accordance with the Laws of Minnesota 1984, chapter 539, has appropriated $500,000 for the purpose of providing the United States with technical and computer assistance for implementing the settlement provided for in this Act.

'(3) The United States has appropriated $6,600,000 for economic development for the benefit of the White Earth Band of Chippewa Indians.

'(b) Upon final acceptance by the Secretary, the land referred to in subsection (a)(1) shall be deemed to have been reserved as of the date of the establishment of the White Earth Reservation and to be part of the trust land of the White Earth Reservation for all purposes.

'Sec. 11. Nothing in this Act is intended to alter the jurisdiction currently possessed by the White Earth Band of Chippewa Indians, the State of Minnesota, or the United

States over Indians or non-Indians within the exterior boundaries of the White Earth Reservation.

'Sec. 12. (a) There is established in the Treasury of the United States a fund to be known as the White Earth Economic Development and Tribal Government Fund. Money in this Fund shall be held in trust by the United States for the White Earth Band of Chippewa Indians, and shall be invested and managed by the Secretary in the same manner as tribal trust funds pursuant to the Act of June 24, 1938 (25 U.S.C. 162a).

'(b) The White Earth Economic Development and Tribal Government Fund shall consist of -

'(1) money received by the White Earth Band as compensation pursuant to section 8; and

'(2) money received by the White Earth Band as a result of amounts forfeited pursuant to section 8(f); and

'(3) money received as an appropriation pursuant to section 15; and

"(4) income accruing on such sums.

Income accruing to the White Earth Economic Development and Tribal Government Fund shall, without further appropriation, be available for expenditure as provided in subsection (c).

'(c) Income from the fund may be used by the authorized governing body of the band for band administration. Principal and income may be used by the authorized governing body of the band for economic development, land acquisition, and investments: *Provided, however*, That under no circumstances shall any portion of the moneys described in subsection (b) be used for per capita payments to any members of the band; *Provided further*, That none of the funds described in subsection (b) shall be expended by the governing body of the band until -

'(1) such body has adopted a band financial ordinance and investment plan for the use of such funds; and

'(2) such body has submitted to the Secretary a waiver of liability on the part of the United States for any loss resulting from the use of such funds; and

'(3) the Secretary has approved the band financial ordinance and investment plan. The Secretary shall approve or reject in writing such ordinance and plan within sixty days of the date it is mailed or otherwise submitted to him: *Provided*, That such ordinance and plan shall be deemed approved if, sixty days after submission, the Secretary has not so approved or rejected it. The Secretary shall approved the ordinance and plan if it adequately contains the element specified in this subsection.

'Sec. 13. Notwithstanding any other law to the contrary, the United States grants its permission to the State of Minnesota to transfer land to the White Earth Band as described in section 10(a)(1) which prior to the date of enactment of this Act [Mar. 24, 1986] may have been obtained by the State pursuant to other Federal law or with Federal assistance. Any restrictions or conditions imposed by any other Federal law or regulation on the transfer of such land are hereby waived and removed.

'Sec. 14. Not later than five years, or as soon as possible, after the date of the enactment of this Act [Mar. 24, 1986], the Secretary shall make all determinations, provide all notices, and complete the administrative work necessary to accomplish the objectives of this Act. The Secretary shall give priority in making compensation determinations and payments under this Act to original allottees and elderly heirs. The Secretary shall

submit a report by January 1 of each year to the chairman of the House of Representatives Committee on Interior and Insular Affairs and the chairman of the Senate Committee on Indian Affairs, which report shall summarize the administrative progress to date and shall estimate the amount and nature of work left to be done.

'Sec. 15. There are hereby authorized to be appropriated to the White Earth Band $6,600,000 as a grant to be expended as provided in section 12.

'Sec. 16. None of the moneys which are distributed under this Act shall be subject to Federal or State income taxes or be considered as income or resources in determining eligibility for or the amount of assistance under the Social Security Act [section 301 et seq. of Title 42, The Public Health and Welfare] or any other federally assisted program.

'Sec. 17. The Secretary is authorized, if so requested by the authorized governing body of the White Earth Band, to exchange any of the land which is transferred to the United States as described in section 10(a)(1) for any other land within the exterior boundaries of the White Earth Reservation which is owned by the United States, the State of Minnesota, or any of the State's political subdivisions. Nothing in this section shall be deemed to require an exchange not agreed to by all parties to the exchange.

'Sec. 18. Any lands acquired by the White Earth Band within the exterior boundaries of the White Earth Reservation with funds referred to in section 12, or by the Secretary pursuant to section 17, shall be held in trust by the United States. Such lands shall be deemed to have been reserved from the date of the establishment of said reservation and to

be part of the trust land of the White Earth Band for all purposes."

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 94-4080MNST

Mabel Shangreau,	*	
	*	
Appellant,	*	
	*	
vs.	*	Appeal from the United States
	*	District Court for the
Bruce Babbitt, etc.,	*	District of Minnesota
	*	
Appellee.	*	

Appellant's petition for rehearing has been considered by the Court and is denied.

January 4, 1996

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit